

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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5 In the Matter of:

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7 PURDUE PHARMA L.P., et al., Case No. 19-23649 (RDD)

8 (Jointly Administered)

9 Debtors.

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12
13 United States Bankruptcy Court

14 One Bowling Green

15 New York, New York 10004-1408

16
17 January 20, 2021

18 10:08 AM

19 HEARING HELD TELEPHONICALLY

20 VIA COURT SOLUTIONS

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23 B E F O R E :

24 HON ROBERT D. DRAIN

25 U.S. BANKRUPTCY JUDGE

1 Hearing re: Motion of the Debtors for an Order Approving
2 Stipulation and Agreed Order Granting Joint Standing to
3 Prosecute Claims and Causes of Action Related to the
4 Insurance Coverage to (1) Official Committee of Unsecured
5 Creditors and (2) Ad Hoc Committee of Governmental and other
6 Contingent Litigation Claimants (ECF #2227)

7
8 Hearing re: Objection to Motion (related document(s)2227)
9 filed by George Calhoun IV on behalf
10 of Ironshore Specialty Insurance Company. (ECF #2281)

11
12 Hearing re: The Ad Hoc Group of Non-Consenting States
13 Statement in Support of Debtors Motion to Approve
14 Stipulation Granting Joint Standing to Prosecute Claims and
15 Causes of Action Related to the Debtors Insurance Coverage
16 to (1) the Official Committee of Unsecured Creditors and (2)
17 the Ad Hoc Committee of Governmental and Other Contingent
18 Litigation Claimants Filed by Andrew M. Troop on Behalf of
19 Ad Hoc Group of Non-Consenting States. (ECF #2289)

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1 Hearing re: Reply in Support of the Motion of the Debtors
2 for an Order Approving Stipulation and Agreed Order Granting
3 Joint Standing to Prosecute Claims and Causes of Action to
4 the Insurance Coverage to (1) Official Committee of
5 Unsecured Creditors and (2) Ad Hoc Committee of Governmental
6 and other Contingent Litigation Claimants (related
7 document(s)2227) filed by Benjamin S. Kaminetzky on behalf
8 of Purdue Pharma L.P. (ECF #2292)

9
10 Hearing re: Motion to Approve/Motion for Claim Payment, re:
11 Claims No. 10231, 615270, 615218 and 614341 with Certificate
12 of Service filed by Deborah Clonts (ECF #2059)

13
14 Hearing re: Objection to Motion / Debtors' Omnibus
15 Objection to Deborah Clont's Motions to Approve Claimant
16 Payment and for Lift of Automatic Stay (related
17 document(s)2209, 2059, 2175) filed by James I. McClammy on
18 behalf of Purdue Pharma L.P. (ECF#2266)

19
20 Hearing re: Motion for Lift of Automatic Stay filed by
21 Deborah Clonts (ECF #2175)

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1 Hearing re: Debtors' Omnibus Objection to Deborah Clont's
2 Motions to Approve Claimant Payment and for Lift of
3 Automatic Stay (related document(s)2209, 2059, 2175) filed
4 by James I. McClammy on behalf of Purdue Pharma L.P.
5 (ECF #2266)

6
7 Hearing re: Letter dated 12/21/2020 in support of Amended
8 Motion for Lifting of the Automatic Stay (dated 12/21/2020)
9 Filed by Deborah Clonts (ECF #2194)

10
11 Hearing re: Amended Motion to Amend Motion for Lift of
12 Automatic Stay (related document(s)2175) filed by Deborah
13 Clonts (ECF #2209)

14
15 Hearing re: Fifth Amended Order Extending Time to Object to
16 Dischargeability of Certain Debts (related document(s)1829,
17 1289, 700, 720, 1009, 1524) filed by Eli J. Vonnegut on
18 behalf of Purdue Pharma L.P. with presentment to be held on
19 1/19/2021 at 10:00 AM (ECF #2220)

20
21 Hearing re: Objection to Debtors' Fifth Amended Order
22 Extending Time to Object to Dischargeability of Certain
23 Debts filed by Deborah Clonts (ECF #2270)

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1 Hearing re: Debtors' Reply in Further Support of the Fifth
2 Amended Order Extending Time to Object to Dischargeability
3 of Certain Debts [Related to ECF No. 2220 and ECF No.
4 2270] filed by James I. McClammy on behalf of Purdue Pharma
5 L.P. (ECF #2287)

6
7 Hearing re: Motion of Debtors for Entry of an Order
8 Extending Time to Object to Dischargeability of Certain
9 Debts (ECF #700)

10
11 Hearing re: Order signed on 1/7/2020. Extending Time to
12 Object to Dischargeability of Certain Debts (ECF #720)

13
14 Hearing re: First Order signed on 4/2/2020 Extending Time
15 to Object to Dischargeability of Certain Debts (related
16 document(s)720) (ECF #1009)

17
18 Hearing re: Second Amended Order signed on 6/17/2020
19 Extending Time to Object to Dischargeability of Certain
20 Debts (ECF #1290)

21
22 Hearing re: Third Amended Order signed on 7/27/2020
23 Extending Time to Object to Dischargeability of Certain
24 Debts to and including November 2, 2020 (ECF #1524)

25

1 Hearing re: Fourth Amended Order signed on 10/21/2020
2 Extending Time to Object to Dischargeability of Certain
3 Debts (ECF #1829)
4

5 Hearing re: Motion to Intervene filed by KatieLynn B
6 Townsend on behalf of Dow Jones & Company, Inc., Boston
7 Globe Media Partners, LLC, and Reuters News & Media, Inc.
8 (ECF #2022)
9

10 Hearing re: Statement / The Ad Hoc Group of Non-Consenting
11 States' Statement Regarding the Motion to Intervene and
12 Unseal Judicial Records by Dow Jones & Company, Inc.,
13 Boston Globe Media Partners, LLC, and Reuters News & Media,
14 Inc. (related document(s)2022) filed by Andrew M. Troop on
15 behalf of Ad Hoc Group of Non- Consenting States (ECF #2065)
16

17 Hearing re: Statement in Support of Motion to Intervene
18 (related document(s)2022) filed by Paul A. Rachmuth on
19 behalf of Ad Hoc Committee on Accountability (ECF #2066)
20
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1 Hearing re: Response /The NAS Children Ad Hoc Committee's
2 Joinder to the Ad Hoc Group of Non-Consenting States'
3 Statement Regarding the Motion to Intervene and Unseal
4 Judicial Records by Dow Jones & Company, Inc., Boston Glob
5 Media Partners, LLC and Reuters News & Media, Inc. (related
6 document(s)2065) filed by Scott S. Markowitz on behalf of Ad
7 Hoc Committee of NAS Babies (ECF #2090)

8
9 Hearing re: Statement of The Raymond Sackler Family In
10 Respect of The Motion To Intervene And Unseal Judicial
11 Records By Dow Jones & Company, Inc., Boston Globe Media
12 Partners, LLC, and Reuters News & Media, Inc. (related
13 document(s)2022) filed by Gerard Uzzi on behalf of The
14 Raymond Sackler Family (ECF #2132)

15
16 Hearing re: Debtors' Limited Objection to the Media
17 Intervenors' Motions to Intervene and Unseal Judicial
18 Records and Cross-Motion to Seal Certain Judicial Records
19 (related document(s)1828, 2188) filed by Benjamin S.
20 Kaminetzky on behalf of Purdue Pharma L.P. (ECF #2252)

21
22 Hearing re: Reply to Motion to Unseal (related
23 document(s)2022) filed by KatieLynn B Townsend on behalf of
24 Dow Jones & Company, Inc., Boston Globe Media Partners, LLC,
25 and Reuters News & Media, Inc. (ECF #2288)

1 Hearing re: Motion to Amend Proposed Order (related
2 document(s)2022) filed by KatieLynn B. Townsend on behalf of
3 Dow Jones & Company, Inc., Boston Globe Media Partners,
4 LLC, and Reuters News & Media, Inc. (ECF #2039)

5
6 Hearing re: Notice of Adjournment of Hearing on Motion to
7 Intervene and Unseal (related document(s)2022) filed by
8 KatieLynn B Townsend on behalf of Dow Jones & Company, Inc.,
9 Boston Globe Media Partners, LLC, and Reuters News & Media,
10 Inc. (ECF #2091)

11
12 Hearing re: Stipulation / Notice of Filing of Stipulation
13 and Agreed Order Regarding Media Intervenors' Motion to
14 Unseal Materials Filed in Connection with UCC Privilege
15 Motions and Adjournment of Hearing on Media Intervenors'
16 Motion to Unseal (related document(s)2022) Filed by Benjamin
17 S. Kaminetzky on behalf of Purdue Pharma L.P. (ECF #2136)

18
19 Hearing re: Stipulation and Agreed Order Signed on
20 12/15/2020 Regarding Media Intervenors' Motion to Unseal
21 Materials Filed in Connection with UCC Privilege Motions and
22 Adjournment of Hearing on Media Intervenors' Motion to
23 Unseal (related document(s)2022) (ECF #2140)

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1 Hearing re: Debtors' Ex Parte Motion for Entry of an Order
2 Shortening Notice with Respect to Debtors' Motion for Entry
3 of an Order Sealing Judicial Documents (related
4 document(s)2252) filed by Benjamin S. Kaminetzky on behalf
5 of Purdue Pharma L.P. (ECF #2153)

6
7 Hearing re: Declaration of Jon Lowne in Support of the
8 Debtors' Limited Objection to Media Intervenors' Motions to
9 Intervene (related document(s)2252) filed by Benjamin S.
10 Kaminetzky on behalf of Purdue Pharma L.P. (ECF #2154)

11
12 Hearing re: Second Motion to Intervene and Unseal filed by
13 KatieLynn B Townsend on behalf of Dow Jones & Company, Inc.,
14 Boston Globe Media Partners, LLC, and Reuters News & Media,
15 Inc. (ECF #2188)

16
17 Hearing re: Debtors' Limited Objection to the Media
18 Intervenors' Motions to Intervene and Unseal Judicial
19 Records and Cross-Motion to Seal Certain Judicial Records
20 (related document(s)1828, 2188) filed by Benjamin S.
21 Kaminetzky on behalf of Purdue Pharma L.P. (ECF #2252)

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1 Hearing re: Statement of the Raymond Sackler Family in
2 Respect of the Second Motion to Unseal Judicial Records by
3 Media Intervenors Dow Jones & Company, Inc., Boston Globe
4 Media Partners, LLC, and Reuters News & Media, Inc. (related
5 document(s)2132, 2188) filed by Gerard Uzzi on behalf of The
6 Raymond Sackler Family. (ECF #2265)

7
8 Hearing re: Reply to Motion to Unseal (related
9 document(s)2022) filed by KatieLynn B Townsend on behalf of
10 Dow Jones & Company, Inc., Boston Globe Media Partners, LLC,
11 and Reuters News & Media, Inc. (ECF #2288)

12
13 Hearing re: Debtors' Ex Parte Motion for Entry of an Order
14 Shortening Notice with Respect to Debtors' Motion for Entry
15 of an Order Sealing Judicial Documents (related
16 document(s)2252) filed by Benjamin S. Kaminetzky on behalf
17 of Purdue Pharma L.P. (ECF #2253)

18
19 Hearing re: Declaration of Jon Lowne in Support of the
20 Debtors' Limited Objection to Media Intervenors' Motions to
21 Intervene (related document(s)2252) filed by Benjamin S.
22 Kaminetzky on behalf of Purdue Pharma L.P. (ECF #2254)

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1 Hearing re: Debtors' Ex Parte Motion for Entry of an Order
2 Shortening Notice with Respect to Debtors' Motion for Entry
3 of an Order Sealing Judicial Documents (related
4 document(s)2252) filed by Benjamin S. Kaminetzky on behalf
5 of Purdue Pharma L.P. (ECF #2253)

6
7 Hearing re: Debtors' Limited Objection to the Media
8 Intervenors' Motions to Intervene and Unseal Judicial
9 Records and Cross-Motion to Seal Certain Judicial Records
10 (related document(s)1828, 2188) filed by Benjamin S.
11 Kaminetzky on behalf of Purdue Pharma L.P. (ECF #2252)

12
13 Hearing re: Debtors' Ex Parte Motion for Entry of an Order
14 Shortening Notice with Respect to Debtors' Motion for Entry
15 of an Order Sealing Judicial Documents (related
16 document(s)2252) filed by Benjamin S. Kaminetzky on behalf
17 of Purdue Pharma L.P. (ECF #2153)

18
19 Hearing re: Second Motion to Intervene and Unseal filed by
20 KatieLynn B Townsend on behalf of Dow Jones & Company, Inc.,
21 Boston Globe Media Partners, LLC, and Reuters News & Media,
22 Inc. (ECF #2188)

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24 Transcribed by: William J. Garling, Pamela A. Skaw, and
25 Sherri L. Breach

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1 P R O C E E D I N G S

2 THE CLERK: Good morning, everyone. My name is
3 Brian, one of Judge Drain's court clerks.

4 Just as a reminder, today's hearing is 100 percent
5 telephonic, so we do ask everyone to please carry yourself
6 with the same decorum you would inside the courtroom.

7 Please remember to keep your lines muted when not
8 speaking so we can avoid any unnecessary background noises
9 that may interfere with today's hearing, and make sure to
10 unmute yourself before speaking so that you are heard.

11 We do ask that everyone please state your name
12 each time that you speak so that the judge, all other
13 participants, and the recording for the transcriber can keep
14 track of who is speaking at all times.

15 Thank you, everyone, for your cooperation and your
16 participation, and the judge will be joining us in just a
17 few short minutes.

18 (Pause)

19 UNIDENTIFIED SPEAKER: Hi, Dr. Jay
20 (indiscernible).

21 THE COURT: Good morning, this is Judge Drain.

22 We're here on the omnibus hearing date in January
23 for Purdue Pharma, L.P. et al. This hearing is completely
24 telephonic.

25 You should identify yourself and if you're a

1 lawyer or your client, the first time you speak, you should
2 do so thereafter so there's no doubt that the court reporter
3 can put together your name with your voice.

4 Because this hearing is completely telephonic, you
5 should keep your phone on mute unless you are speaking, of
6 course, another which point you should unmute yourself.
7 There's one authorized recording of these hearings. It's
8 taken on a daily basis by Court Solutions and provided on a
9 daily basis to our Clerk's Office.

10 If you want a transcript of the hearing on your
11 matter, you should contact the Clerk's Office to arrange for
12 the production of one.

13 So, with that introduction, I have the amended
14 agenda for these omnibus hearings, which came in yesterday
15 and I'm happy to go down that agenda in the order that the
16 agenda lists the matters.

17 MR. HUEBNER: Thank you, Your Honor.

18 Let me first do a sound check. This is Marshall
19 Huebner of Davis Polk, on behalf of the Debtors.

20 Can you Court hear me clearly?

21 THE COURT: Yes, I can hear you fine. Thanks.

22 MR. HUEBNER: Terrific.

23 Good morning, Your Honor. Happy new year, on this
24 important day, obviously, on events far outside of this
25 case.

1 As is our custom, I would like to give a brief,
2 and actually in today's case, an unusually brief overall
3 case update before turning to the agenda.

4 Number one, Your Honor, good news on the Noramco
5 front. So, I would like to note for the benefit of the
6 Court and all parties, that the Noramco Coventry sale that
7 was approved by motion last year closed on December 31st,
8 2020, as we hoped it would. You know, with all the issues
9 going on in this case (indiscernible) other cases would be
10 very important case developments risked being lost entirely.
11 As we stated in our September 14th motion, this sale will
12 inject significant incremental value into the estate by
13 reducing the cost to Purdue of obtaining necessary active
14 pharmaceutical ingredients for various products.

15 And now that the transaction has closed, I'm very
16 pleased to report that we think that the savings will be
17 even greater than we had projected and will likely,
18 substantially feed \$100 million, frankly, of incremental
19 value to stakeholders, which is, in the context of this
20 case, and given the unexpected uses of the estate's value,
21 is particularly important.

22 Number two, Your Honor, very briefly, what I would
23 call cash balance and health of the business. So that the
24 Court knows, the Debtors' cash balance as of our last
25 publicly filed MOR is \$1.275 billion, which, remarkably, is

1 pretty close to what the considerable cash balance was on
2 the petition date almost a year and a half ago.

3 So that it's clear to all parties, this most
4 assuredly has not been achieved through increase or even in
5 the maintenance of the level of opioid sales. In fact, if
6 you look at the November MOR and compare it to the one from
7 a year ago, you would see that our net sales are actually
8 down about 22 percent from the same month a year ago;
9 rather, the cash balance is a result of prudent, strategic
10 decisions and stewardship. It's all the more impressive
11 when you consider the extraordinary burdens of this case
12 both, in soft and hard costs.

13 The complex underlying pharmaceutical business,
14 which obviously has many products, not just OxyContin, as I
15 have said a few times before over the last many months,
16 often gets lost in our various discussions of Purdue as a
17 Defendant or Purdue as a Debtor and the businesses, in fact,
18 have been managed and then performed exceptionally well in
19 the face of the truly extraordinary costs and enormous
20 challenges of these Chapter 11 cases and, of course, the
21 national climate and the pandemic, which has obviously
22 resulted in our highly regulated, you know, factories and
23 other facilities and even more extraordinary restrictions
24 that, you know, were further had to be dealt with and
25 addressed.

1 Number three, Your Honor, very briefly, on the PHI
2 initiatives, just a quick update since we did turn the year-
3 end, the Debtors have continued to progress their public
4 health initiative since each was last discussed with the
5 Court. We, of course, fully understand and has made clear
6 many times that what happens with the Debtors' assets, post-
7 emergence, including with respect to the scope and the costs
8 of PHI initiatives is an issue whose precise contours are to
9 be worked out with the relevant stakeholders, but while in
10 Chapter 11, as we've also said many times, the company's job
11 continues to be on a cost-effective way advancing these
12 important public health initiatives so that decisions can
13 then be made.

14 As a reminder, we were last before the Court on
15 this topic on June 23rd, 2020, almost seven months ago. And
16 since then, there have been, which I will very quickly tick
17 through, a couple of -- several, actually, very important
18 milestones. Number, with respect to Nalmefene, which is the
19 medication intended to reverse opioid overdoses, the Debtors
20 in December filed with the FDA, an abbreviated new drug
21 application, known in the field as an NDA, for approval of
22 the vial version, V-I-A-L, of Nalmefene, and the approval of
23 the other forms, including the autoinjector, which I'm sure
24 the Court remembers, we discussed at some length, are on
25 track as well. The target submission date for the prefilled

1 syringe is May 2021 and the autoinjector target filing date
2 is May 2022.

3 With respect to the Debtors' generic version of
4 suboxone tablets, which is one of the leading, current
5 opioid addiction treatments, the FDA approved the Debtors in
6 March and as of May 2020, Purdue's generic suboxone tablets
7 were manufactured and ready for shipment. So, that one is
8 already at fruition.

9 With respect to the thing we discussed most
10 recently, which is the HRT, low-cost, over-the-counter
11 naloxone nasal spray, to take it out of the world of
12 prescription and hopefully lower the cost dramatically for
13 the whole country, really, this is the medicine that is
14 similar no NARCAN and is intended to be used to reverse
15 opioid overdoses.

16 One clinical trial is required by the FDA
17 (indiscernible) approval. That actually commenced in
18 September 2020, which followed the FDA's tentative approval
19 of RIVIVE, R-I-V-I-V-E, as the trade name, in May 2020.

20 The target, new-drug application submission date
21 for OTC naloxone is the third quarter of this year with
22 approval and launch both expected in the year thereafter.

23 So, I am happy to report since we, as you know,
24 and many others candidly think that these are extremely
25 important medications, that PI is progressing on track.

1 The last topic, Your Honor, before we go to the
2 agenda is where we are, you know, the end of exclusivity,
3 other upcoming dates in the case and the status of
4 mediation, which I will touch very lightly, but I think a
5 couple of very quick updates are important.

6 Obviously, Your Honor, it's not lost on anyone
7 dialed in this morning to the hearing that you ruled at our
8 last hearing that the mediation will be concluding on
9 January 31, which, at this point, is 11 days away and after
10 that, of course, exclusivity, as the Debtors requested, ends
11 on February 15th.

12 But February 15th is actually a critically
13 important date in this case for a second reason, as well.
14 The extraordinary injunction originally granted by this
15 Court on October 11th, 2019, is currently slated to expire
16 on March 1 and the deadline by which the Debtors have to
17 file a motion to extend that injunction, with respect to
18 either or both of the Debtors and the shareholder-related
19 persons is in fact February 15th on the motion that we
20 expect to be heard at the March 1 hearing at 10:00 a.m.

21 With respect to these issues, I think it's very
22 important for the Court and all parties to understand that
23 unless a settlement has been reached with the shareholders
24 by February 15th or the Debtors believe that one will very
25 soon be reached on or about that date, as I stand here today

1 it is very difficult for me to conceive of a circumstance in
2 which the Debtors would, on February 15th, move to extend
3 the injunction, with respect to the shareholder-related
4 (indiscernible).

5 So, that brings us back to February 15th, which is
6 26 days from today. With respect to the mediation, as the
7 Court and the parties are, of course, also aware, we are
8 extremely limited, as we should be, by the confidentiality
9 provisions and the mediation order we asked this Court to
10 enter as to what we can report. That said, I don't think
11 it's telling any tales out of school today that we are not
12 currently where we need to be or, of course, I would be
13 standing here today making a good news announcement and I am
14 clearly not doing that.

th

15 We have 26 days until February 15 , and we are
16 working as hard as we know how to on many, many issues with
17 many parties. And on or about February 15th, we will, as we
18 have been ordered to, as, of course, must because of
19 exclusivity, file the best plan then possible, which we hope
20 will have widespread support, even if it does not yet have
21 complete consensus.

22 As Your Honor has told us again, and again, and
23 again, including on June 3rd, July 23rd, September 30th, and
24 December 15th, work hard to build consensus, but the Court
25 understands the likelihood that everyone will be onboard

1 with all aspects as of any particular date, and that the
2 Debtors need to take the conversations as far as they can,
3 but also need to move the cases forward and not let the
4 perfect be the enemy of the good.

5 I will cite only three examples for context and
6 then turn the agenda over. On June 3rd, 2020, you said, and
7 I quote:

8 "The parties in this case need to realize that the
9 results in this case cannot be exactly what they want.
10 Perfection is not achievable here... I want this case to
11 move ... and one way to do that is to tell the Debtors we
12 don't need consensus on everything."

13 On July 23rd, 2020, you said:

14 "I sincerely hope that that's an agreement that
15 involves and includes all the mediation parties, but, again,
16 having served in that role many times, I know that sometimes
17 you can't achieve that. Maybe you get all but one, for
18 example. I'm not expecting complete consensus ... so I
19 would urge the parties, as I did last month, to put aside
20 the perfect and agree on the good and move on with things to
21 the next stage of this case."

22 And then, finally, and even in more direct context
23 on December 15th, you said:

24 "The parties don't have to reach agreement, but I
25 urge them to do their best to do so by January 31 on these

1 issues so that if possible, a settlement is reached on both
2 the Debtor claims and potentially the third-party claims ...
3 the parties simply need to conclude these negotiations so
4 the plan can be filed because as we all know, every day that
5 passes, some poor soul is not getting either the counseling
6 that he or she needs or the treatment that he or she needs
7 or a NAF baby is no longer a baby and their grandparents are
8 not getting the help they need."

9 We will of course follow the Court's clear and
10 consistent admonitions. Candidly, Your Honor, I don't know,
11 as I stand here today, exactly what plan we will be filing.
12 We have 26 days left and we know that the relevant parties
13 will remain intentionally and fully engaged both, through
14 the end of mediation on January 31, as well as the first two
15 weeks in February.

16 But I can assure you, Your Honor, that we will
17 file the best plan we can, based on where we are in the
18 middle of February. With that, Your Honor, unless the Court
19 has any questions, I would propose to proceed with the
20 agenda.

21 THE COURT: Okay. Thanks for the update.

22 I don't have any questions. I don't know if
23 there's anything that anyone, for example, the committee,
24 wants to respond to or whether to just move on to the
25 agenda. So, I'll pause for a moment if someone wants to

1 address anything that Mr. Huebner has not covered in his
2 opening remarks?

3 (Pause)

4 THE COURT: Okay. Then, why don't we proceed down
5 the agenda.

6 MR. HUEBNER: Terrific, Your Honor.

7 Item 1 on the agenda is a contested matter which
8 is the Debtors' motion. I would ask my partner, Mr.
9 Kaminetzky, if he would step up to the electronic podium and
10 handle the motion to approve the insurance stipulation.

11 THE COURT: Okay.

12 MR. KAMINETZKY: Good morning, Your Honor. May I
13 please the Court, Benjamin Kaminetzky of Davis Polk on
14 behalf of Purdue, its 22 subsidiaries, and Purdue Pharma,
15 Inc., its general partner.

16 Can you hear me all right?

17 THE COURT: Yes, I can hear you fine. Thanks.

18 MR. KAMINETZKY: So, Your Honor, I'll be
19 addressing the Debtors' motion for the Court to approve the
20 stipulation agreed order granting joint standing to
21 prosecute the Debtors' insurance causes of action to the UCC
22 and the ad hoc committee, which I'll refer to together as
23 "the committees."

24 The stipulation represents an almost unprecedented
25 occasion in these cases where relief has been requested

1 and/or supported by both estate fiduciaries, the Debtors,
2 and the UCC, by the ad hoc committee, and by the non-
3 consenting states group, whose statement in support is at
4 Docket Number 2289.

5 I'll also be responding to the single objection
6 filed by Ironshore Specialty Insurance, formerly known as
7 TIG, one of the Debtors' insurers. I will refer to them as
8 "TIG."

9 Now, consistent with the coordination and
10 cooperation among the Debtors and the committees that the
11 stipulation embodies, the committees have left it to me to
12 present the argument on this motion and my colleagues from
13 Akin and the Gilbert firm will step in only on rebuttal or,
14 of course, if the Court has any questions specifically for
15 one of them.

16 Your Honor, three sentences of context. Debtors
17 and certain related parties are insureds, pursuant to over
18 100 insurance policies covering periods between 2001 and
19 2018 from over 30 insurance groups, which together provide
20 over \$3 billion of coverage limits for, among other things,
21 product liability, general liability, and D&O liability.
22 Aside from approximately \$275 million that has been
23 exhausted or is insolvent, this coverage remains
24 unexhausted. The collective proceeds of this remaining
25 coverage is a very large substantial asset of the Debtors'

1 estate to say the least.

2 Now, the stipulation reflects the Debtors'
3 judgment that is in the best interests of the estates for
4 the Debtors and the committees to cooperate and share
5 responsibility for pursuing the Debtors' insurance proceeds,
6 in which they all share a common interest. The Debtors and
7 the committees, of course, hope to obtain these proceeds
8 through consensual resolution with our insurers, but certain
9 insurers have been unwilling to engage in productive
10 negotiations.

11 Now, given that intransigence, the Debtors and the
12 committees must prepare and be in a position to seek
13 litigated relief. This stipulation accomplishes the goals
14 of cooperation and coordination through the following means.
15 Briefly, Your Honor, first it confers joint standing, so-
16 called Housecraft standing on the committees, and authorized
17 the committees jointly as co-Plaintiffs and co-parties with
18 the Debtors to assert, litigate, and resolve any or all
19 claims, causes of action, disputes, or other matters related
20 to Debtors' insurance on behalf of the estates.

21 To be clear, the Debtors will share their standing
22 with the UCC and the ad hoc committee. This is not STN and
23 it's not Commodore; it's Housecraft. The Debtors and the
24 committees are committed to cooperating and coordinating in
25 regards to the Debtors insurance causes of action.

1 Importantly, Your Honor, nothing in this, as
2 stated in the stipulation in recital J, nothing in the
3 stipulation order shall predetermine the terms of a plan of
4 reorganization or bind a post-emergence entity after the
5 effective date of any plan of reorganization in these
6 Chapter 11 cases; in other words, this stipulation does not
7 address or affect who will have the authority to prosecute
8 the Debtors' insurance causes of action after the effective
9 date of the plan of reorganization and the emergence from
10 bankruptcy, at which point, if the insurance issues are not
11 resolved, (indiscernible) will transfer to the post-
12 emergence entity in charge of pursuing any of the Debtors'
13 remaining insurance proceeds.

14 Now, second, the stipulation states that the
15 Debtors will not seek approval of any settlement related to
16 the insurance causes of action without the consent of at
17 least one of the committees and neither of the committees
18 will seek such approval without the consent of the Debtors.
19 The point of this provision, Your Honor, is to avoid
20 disputes and minimize the need to any messy litigation over
21 any proposed insurance settlement.

22 Your Honor, the motion, stipulation are a
23 straightforward application of the Second Circuit's decision
24 in Housecraft. Housecraft, as Your Honor well knows,
25 confirmed that a Debtor, like Purdue here, may consensually

1 request, as we have done, that the Court vest committees of
2 creditor or even a single creditor with joint standing to
3 pursue estate causes of action alongside the Debtor, so long
4 as it's in the best interest of the bankruptcy estate and
5 necessary and beneficial to the fair and efficient
6 resolution of the case.

7 No one, not even TIG suggests that the motion and
8 stipulation are not necessary and beneficial to the fair and
9 efficient resolution of the case. So, there's only one
10 issue before Your Honor today, and that's whether it is in
11 the best interests of the estates for the Court to confer
12 joint standing to the committee under the terms of
13 stipulation consistent with Housecraft and its progeny, so
14 that the committees can coordinate and participate with the
15 Debtors in pursuing the Debtors' insurance causes of action.

16 And we submit, Your Honor, that the answer here is
17 easy and it's an easy yes. The proposed insurance
18 stipulation sets up a cooperative framework and marshals the
19 resources available to the estates, including the expertise
20 of ad hoc committee's insurance recovery counsel in order to
21 maximize recovery from the Debtors' insurance causes of
22 action, while at the same time, minimizing any need of the
23 parties to the stipulation to jockey for position, second-
24 guess each other, or to litigate related insurance issues
25 among the estate's key constituencies.

1 A single, focused voice aimed at maximizing
2 recoveries is most certainly in the best interests of the
3 estate. And arriving at an efficient process to pursue
4 proceeds from the Debtors' insurance is critical to the fair
5 and efficient resolution of these cases, as the Debtors'
6 insurance represents one of the estate's most important
7 assets, when faced with resolving over 600,000 claims filed
8 by claimants asserting over \$140 trillion in liability.

9 Your Honor, not one of the claimants that filed
10 these 600,000 claims in these cases has objected to the
11 Debtors' motion or second-guessed the judgment of the
12 Debtors, the UCC, and the ad hoc committee, not one. The
13 only party to object is TIG, one of the Debtors' insurers,
14 and likely a future target of efforts to prosecute the
15 Debtors' insurance causes of action.

16 TIG's objection to what really amounts to an
17 administrative motion is understandably. It has only to
18 gain from obstructing efforts to bring any proceeds from the
19 Debtors' insurance into these estates and it is only TIG and
20 not the estates themselves, as TIG attempts to suggest, that
21 stands to lose if the motion is granted. That alone is
22 enough reason to question TIG's argument that the
23 stipulation is not in the estate's best interests, but most
24 importantly, each of their arguments fails on its merits, as
25 well.

1 First, TIG argues that the UCC, a committee,
2 should not be allowed to participate in insurance disputes
3 because the information TIG would seek in a dispute might
4 increase Debtors' exposure to claims brought by the
5 committee's constituents. Well, as Your Honor well knows,
6 the information sharing in these cases between the Debtors
7 and the committees has been extensive and extraordinary and
8 that is even after the massive amounts of discovery on these
9 issues and the thousands of prepetition lawsuits before we
10 even entered this courtroom. So, the notion that discovery
11 in an adversary proceeding regarding the Debtors' insurance
12 causes of action would somehow expose the Debtors to
13 additional exposure in a bankruptcy case with over 600,000
14 proofs of claim asserting over \$140 trillion in liability
15 is, respectfully, absurd.

16 Second, TIG argued that an ad hoc committee's
17 involvement will not benefit the estates because claims of
18 government creditors are not covered by insurance. Setting
19 aside the fact for a moment that this is simply not true,
20 that TIG's policies did not cover claims of government
21 entities, which the Debtors and committees will be happy to
22 address upon full briefing at the appropriate time, there is
23 clearly a benefit to all creditors, including those
24 represented by the ad hoc committee to increase the source
25 of value available for distribution to other creditors, so

1 as to preserve their own share of estate value.

2 Third, TIG argues that the hourly rate of the ad
3 hoc committee's insurance counsel is higher than the rate of
4 the Debtors' insurance counsel; respectfully, this
5 completely misses the point. The stipulation is not about
6 legal-rate arbitrage. The point is that the Debtors will
7 certainly have to pay for this work once and that all
8 parties will benefit from coordination, so that the Debtors
9 do not have to pay for this work twice or three times. This
10 stipulation ensures that.

11 Fourth, TIG objects to a purported veto right that
12 the committees have over any settlement by the Debtors. As
13 discussed, Your Honor, the stipulation provides that the
14 Debtors will now file a 9019 motion for improve an insurance
15 settlement without the consent of at least one of the
16 committees. This is designed to minimize the chance and
17 expense of litigation among the estate's chief
18 constituencies. This is a sound exercise of the Debtors'
19 business judgment and was agreed to build trust and display
20 a unit of purpose.

21 And, by the way, assuring insurers that a
22 settlement is a settlement and not an opportunity to get
23 salami-sliced by others in a contested 9019 process is, I
24 think, a positive, not a negative.

25 Your Honor, at the end of the day, TIG opposes

1 this stipulation because it has a very significant interest
2 in reducing any insurance recovery by the estates. Since
3 the estate's best interests are contrary, this Court should
4 approve this settlement.

5 So, the two elements of Housecraft are satisfied,
6 and I could stop here, but, Your Honor, TIG attempts to cite
7 that the straightforward application of Housecraft by
8 arguing that general state law limits on creditor standing
9 would somehow limit standing under federal bankruptcy law.
10 This is fundamentally mistaken. Federal bankruptcy law, not
11 state law, governs the question of which party or parties
12 may bring an estate cause of action on behalf of a Debtor.
13 And where federal bankruptcy law provides that another party
14 may bring an estate cause of action, be it a trustee or a
15 committee or a creditor that has standing, whether under
16 state law, a creditor or committee would also have separate
17 standing to bring the claim is simply not relevant at all.

18 Indeed, to be crystal clear, the committees do not
19 contend that they currently have standing to pursue the
20 Debtors' insurance proceeds, independent of the Debtor under
21 New York, Delaware, or any other state's law. If the
22 committee did so believe, the motion would be unnecessary.

23 It is therefore no surprise that TIG cites no
24 Second Circuit authority that puts any state law constraints
25 on Housecraft standing. Indeed, Judge Wiles over the summer

1 rejected any attempt to import state law standing doctrines
2 into bankruptcy standing, and I'm referring to the McClatchy
3 case that we heard in July that we included a discussion in
4 our brief.

5 In that case, Judge Wiles explained that what a
6 committee seeks to do under the STN trilogy is to be
7 authorized:

8 "To act as the estate representative to pursue the
9 claims that belong to the estate and to do so as a matter of
10 federal bankruptcy law, not state law."

11 In other words, slightly paraphrasing Judge Wiles,
12 and I'm again quoting, the committee is not asking the Court
13 to permit a derivative claim under the authority of Delaware
14 law or under other state law because, again, "the claims at
15 issue here plainly belongs to the Debtors' estate and should
16 be pursued on behalf of the estate."

17 Now, TIG relies on a few decisions from the
18 District of Delaware, which appear to hold that a committee
19 vested with standing to sue, sues not as the estate, but as
20 a collection of creditors and, thus, only maintains suits
21 that a creditor could maintain under state law. And I'm
22 referring to the cases they cite, the Dura case, the HH
23 Liquidation case, Citadel. But these decisions are simply
24 inconsistent with the Second Circuit's STN, Commodore,
25 Housecraft jurisprudence.

1 The Second Circuit makes clear that a party vested
2 with standing is not prosecuting a cause of action that may
3 prosecute it in its own name, but rather, is suing in the
4 name of the estate by suing alongside with or stepping into
5 the shoes of the Debtor.

6 Now, perhaps these decisions flow from the fact
7 that the Third Circuit's Cybergenics doctrine is somewhat
8 different from the Second Circuit's doctrine. Among other
9 important differences, Cybergenics does not provide an
10 analog of Housecraft. But, in any event, it's clear that
11 these cases have no application to this case because the
12 committees here would be sharing the Debtors' standing, just
13 as a creditor in Housecraft shared the standing of the
14 trustee.

15 And as a reminder, Your Honor, the Second Circuit
16 in Housecraft went so far as to emphasize that:

17 "The case for recognition of a creditor's standing
18 ... is more compelling, whereas here, the trustee or Debtor-
19 in-possession, is also named plaintiff."

20 Second, TIG also conflates the concept of
21 Housecraft standing on the one hand and attempts by a
22 committee to intervene in a Debtors' cause of action in its
23 own right under 1109(b), which provides that parties in
24 interest have a right to appear and be heard. But the
25 proposed insurance stipulation is not grounded on 1109, so

1 this entire line of TIG's argument is simply irrelevant and
2 in addition to being irrelevant, it's also completely wrong.

3 It's clear under Second Circuit decision in Caldor
4 in 2002, that even in the absence of the stipulation, the
5 committees would undoubtedly have an unconditional right to
6 intervene and to appear and be heard in every adversary
7 proceeding involving the Debtors' insurance causes of
8 action. And, further, because Caldor's holding does not
9 draw the core/non-core distinction that TIG hopes to
10 interject, TIG's attempt to raise and litigate that issue
11 now as opposed to do and in connection with full briefing in
12 an adversary proceeding regarding the Debtors' insurance
13 causes of action is not only procedural improper, but it's
14 just plain wrong.

15 Also, the allegedly, factually similar -- that's a
16 quote -- case identified by TIG to support its position,
17 that case out of Alaska, the Catholic Bishop case suffers
18 from at least three defects. First, it did not involve a
19 Debtors' consent to a committee gaining standing, but,
20 rather, was addressing 1109(b). Second, the Court there, I
21 believe it mistakenly conflated the interests of the
22 committee with those of an individual tort claimant. And
23 most importantly, in addressing Section 1109(b), the Court
24 there expressly rejected Caldor, which is binding, Second
25 Circuit precedent for the principle that a creditor has

1 unconditional rights to intervene in an action commenced by
2 a Debtor and, instead, cited other Circuit's approach to
3 intervention.

4 Your Honor, finally, TIG's express attempts to
5 litigate the motion for relief from stay without notice in
6 summary fashion in a paragraph is entirely improper and
7 should be denied at this time without prejudice.
8 Procedurally, this motion was never adjourned or re-noticed
9 as direct by the Court at the January 24th, 2020, omnibus
10 hearing, and TIG raising the issue in an objection to an
11 unrelated motion certainly does not comply with the 21-day
12 notice requirement that is required under the case
13 management order for all motions to lift stay.

14 Substantively, as noted in the Debtors' reply,
15 TIG's motion for relief from stay is still inappropriate for
16 decision and should be denied. As foreshadowed by the
17 stipulation and TIG's vociferous objection to it, it is
18 likely to be very soon that the Debtors and committees
19 decide to litigate in this court the claims TIG argues
20 should be subject to arbitration.

21 When that happens, the parties to the proceedings
22 will be able to fully brief and argue those important
23 issues, but that day is not today.

24 In sum, Your Honor, it is clear that TIG has
25 fallen well short of demonstrating that the stipulation is

1 not in the best interests of the estates and the silence and
2 assent of each and every one of the creditors of these
3 estates certainly speak much louder than the self-serving
4 suggestion of a target insurer that it knows better than
5 everyone else what is in the estate's best interests.

6 Accordingly, TIG's objection should be overruled
7 in its entirety, the Debtors' motion should be granted, and
8 the proposed insurance stipulation, among the Debtors, the
9 UCC, and the ad hoc committee should be entered.

10 Your Honor, unless you have any questions, I would
11 propose to turn the podium over to my colleague Andrew
12 Troop, representing the non-consenting states, who I believe
13 wants to be heard on this issue, as well.

14 THE COURT: Okay. Well, I do have one question,
15 and I probably ought to hear -- well, I should definitely
16 hear from you. I should also hear in anyone who's a party
17 to this stipulation disagrees with your answer.

18 The Debtors' response to the objection by TIG, or
19 T-I-G, relies largely and ultimately, perhaps entirely, on
20 the concept embody in the Commodore and Housecraft cases,
21 that when one is conferred standing under those cases, one
22 has standing to bring the Debtors' causes of action on
23 behalf of the estate, generally, the 541 estate.

24 And in reading the stipulation, paragraph I, which
25 starts on page 3 defines the term Debtors' insurance causes

1 of action and, at least, based on the plain terms of the
2 defined term, Debtors' insurance causes of action, it would
3 appear clear to me that what the parties are agreeing to
4 cooperate on and for which standing is conferred or joint
5 standing along with the Debtor, ala Housecraft, are causes
6 of action that belong to the Debtor.

7 The definition that precedes the defined term
8 arguably could be read a little more broadly. It is any and
9 all claims, causes of action, disputes, or other matters
10 regarding the Debtors' insurance. And the authorization
11 paragraph, paragraph 1 on page 4, says subject to the terms
12 of the stipulation and order, the official committee and the
13 ad hoc committee are hereby granted leave, and shall each
14 have joint standing with the Debtors to assert, litigate,
15 and resolve in each case, co-plaintiffs and co-parties with
16 the Debtors, any and all claims, causes of action, disputes,
17 or other matters regarding the Debtors' insurance causes of
18 action on behalf of the Debtors' estates.

19 Now, I read that to mean in paragraph 1,
20 particularly in light of the last clause, to be on behalf of
21 the Debtors' estates and no one else. One could, I guess,
22 argue that the cooperation provisions of this stipulation
23 could also cover potentially actions that the two committees
24 might have on their own, but I just want confirmation that
25 that's not what's contemplated here. What's contemplated is

1 actions on behalf of the Debtors' estates, exclusively.

2 Is that correct?

3 MR. KAMINETZKY: One hundred percent, Your Honor.

4 That is my intention and apologies if it's unclear. But
5 it's a purely, you know, Housecraft, you know, they can
6 jointly assert with us, (indiscernible) you know, the
7 insurance causes of action that the Debtors have, it doesn't
8 mean to expand or include anything else, other than the
9 Debtors' causes of action.

10 THE COURT: Okay. I don't think it's unclear, but
11 in my experience in insurance litigation, at times,
12 perfectly clear language can be asserted to be unclear and I
13 wanted the record to be clear that this stipulation pertains
14 only to Debtors' estate causes of action or causes of action
15 that belong to the Debtors and their estate.

16 And I mean assuming from the silence by the ad hoc
17 committee and the official committee that that's their view,
18 also.

19 MR. SHORE: Your Honor, this is Richard Shore of
20 Gilbert, LLC on behalf of the ad hoc committee, and I can
21 confirm that, as well, on behalf of the ad hoc committee.

22 THE COURT: Okay.

23 MS. BRAUNER: Good morning, Your Honor.

24 Sara Brauner, Akin Gump, on behalf of the official
25 committee. We confirm it, as well.

1 THE COURT: Okay. Very well.

2 All right. That was my one question, and I am now
3 going to hear briefly from, I think, the non-consenting or
4 the ad hoc committee of non-consenting states. I believe
5 that's who you were going to introduce, Mr. Kaminetzky, and
6 anyone else in support of this motion, if they want to say
7 anything more.

8 MR. KAMINETZKY: That's correct, Your Honor.

9 Mr. Troop has to say something in support and, as
10 I mentioned, in the up front, unless Your Honor has specific
11 questions, which, indeed, the committee and the official
12 committee and the ad hoc committee was just relying on me,
13 subject to any rebuttal.

14 THE COURT: Okay. Very well.

15 MR. TROOP: Thank you, Your Honor.

16 This is Andrew Troop, on behalf of the ad hoc
17 group of non-consenting states. I hope that I am clearly
18 audible.

19 THE COURT: I can hear you fine, thanks.

20 MR. TROOP: Thank you, Your Honor.

21 Your Honor, I will be brief. As Mr. Kaminetzky
22 said, I think other than coming before you and asking for an
23 adjournment, this may be the first time that the four major
24 active groups in this case are here with a united view as to
25 what is in the best interests of these estates, and to be

1 clear, the non-consenting states group not only believes
2 it's in the best interests of these estates for the Debtors'
3 insurance causes of action to be asserted, litigated, if
4 possible, resolved now, but it is in the best interests of
5 these estates for it to be done by this triad of parties.

6 They represent a broad cross-section. Two are
7 fiduciaries. One, in particular, the ad hoc committee's
8 lawyers are, you know, at the Gilbert firm, this is what
9 they do and they do so well, efficiently, and always with
10 the view towards what advances the best interests of the
11 estate in the recognition that the monetization of the
12 Debtors' insurance policies will, regardless of how this
13 case resolves itself through a plan of reorganization,
14 benefit all creditors.

15 We are supportive. We are also very -- we think,
16 also, that the recognitions in the motion and in the
17 statement of common interests that not only the Debtors'
18 committee and the ad hoc committee have, but other
19 committees have. We think that's absolutely right, and we
20 are confident that the checks and balances put into the
21 stipulation to ensure efficiency and voice are the right way
22 to go here.

23 We are also convinced and can understand that we
24 will be on the side parties in the sense of we are common
25 interests parties, and we will be kept apprised and the

1 like, but no more lawyers were necessary, and no more
2 representatives were necessary to achieve the goals here
3 that everyone shares.

4 So, I won't repeat anything on the legal side,
5 which Mr. Kaminetzky covered fully, but at its core, this
6 stipulation strikes the appropriate balance to advance the
7 Estate's interests at a time when it's important to do so
8 and I would urge the Court to approve it. Thank you, Your
9 Honor.

10 THE COURT: Okay. Thank you.

11 All right. I should have said this at the
12 beginning. I've read the pleadings on this and having heard
13 oral argument on behalf of the movants, I'm happy to hear
14 oral argument on behalf of TIG, although, again, I have
15 reviewed the pleadings from both sides.

16 MR. CALHOUN: Good morning, Your Honor.

17 This is George Calhoun of Ifrah Law on behalf of
18 Ironshore Specialty Insurance Company, formerly known as TIG
19 Specialty Insurance Company. I also have Josh Wirtshafter
20 of Kennedys, who's counsel in the pending arbitration.

21 Can you hear me okay, Your Honor?

22 THE COURT: Yes, I can hear you fine, Mr. Calhoun.

23 MR. CALHOUN: Okay. Thank you, Your Honor.

24 So, I know you've read the pleadings. I won't
25 repeat what's in there, but I did want to respond and

1 address to some of the points raised by counsel for Purdue.
2 First, I appreciate the clarification that they're relying
3 strictly on Housecraft, not on 1109(b). Housecraft is,
4 obviously, a controlling Second Circuit decision and
5 depending on how Your Honor interprets it, it's either not
6 applicable or there's a Circuit split, or a third
7 possibility is it's got to be simply applied and find that
8 there's a -- it's not in the best interests of the estate
9 and let me explain why.

10 Housecraft dealt with an avoidance action under
11 Section 548 and in that case, the creditor in that case,
12 BMT, funded the litigation that the trustee otherwise could
13 not undertake, and so it provided a clear benefit to the
14 estate's causes of action, otherwise it would not have been
15 brought at all. So, Housecraft, so that situation is
16 completely different than this case where the Debtor is
17 proposing not only to pay its counsel, but two other sets of
18 counsel to pursue an estate cause of action.

19 Housecraft is also not applicable here, Your
20 Honor, because it didn't direct at all in that case where
21 there was a controlling state law that says that this type
22 of action could not be brought by the third party.
23 Housecraft doesn't necessarily purport to override such
24 state law. There's nothing in the Bankruptcy Code that pre-
25 empts state law that says a creditor or a group of creditors

1 can bring a cause of action against an insurer, which they
2 concede they can't. But it's not the case that there's any
3 sort of express preemption or even applied preemption
4 because they haven't shown any inconsistency here. And,
5 obviously, this is not STN where they've made a demand and
6 haven't been able to pursue it. So, I think those on
7 points, Housecraft just doesn't apply. It's a different
8 situation. There's no need to create a Circuit split
9 between the Second Circuit and the Third Circuit.

10 THE COURT: Well, what's the Third Circuit split?
11 I'm not clear on that. Are you referring to the Delaware
12 Bankruptcy Court cases, obviously, those are not Circuit-
13 level cases.

14 MR. CALHOUN: No, but as Debtors' counsel referred
15 to, it's just a different level of how they apply these
16 principles. I don't know that the Third Circuit objected
17 (indiscernible), but it's going to get to that issue.

18 THE COURT: I guess the other point I would ask
19 you about is the Court in Housecraft, and, of course, it's
20 part of a trilogy, dealt with a statute, 548 of the
21 Bankruptcy Code, which, specifically, confers standing on
22 one party, the trustee or Debtor-in-possession.

23 To me, that's not also any specific issue of or
24 raising any sort of issue that would involve preemption
25 principles. It involved standing principles; i.e., a party

1 can take the place of and step into the shoes of a trustee
2 or Debtor in possession under a particular statute to assert
3 the Debtors' rights and I'm not sure that there is any real
4 distinction there between a federal statute and a state
5 statute.

6 It's really a question of who, as a fiduciary,
7 under the ultimate supervision of the Bankruptcy Court, can
8 act on behalf of the Debtor and its -- estate.

9 MR. CALHOUN: Correct, Your Honor.

10 And what the Second Circuit said in Housecraft
11 with that, if you look at that question, you have to
12 consider what's in the best interests of the estate and --

13 THE COURT: No, I understand that, but I think one
14 would have to admit that the target of potential litigation
15 is probably the least likely person to listen to, as to
16 what's in the benefit of the estate, as opposed to the
17 Debtor and fiduciaries, or tens of thousands of creditors.

18 MR. CALHOUN: I understand that, Your Honor, and,
19 obviously, you can factor in that issue, but as counsel for
20 an insurer, we do feel strongly that our coverage litigation
21 should be with our insurer and not with lawyers for the
22 creditors. It does create (indiscernible) and this really
23 gets into some of the things I want to talk about on that
24 issue, on best interests of the estate and the problems that
25 this causes.

1 I'd just note from the outset, counsel for the
2 Debtors, at one point in his presentation, made the comment
3 that some of the insurance companies were trying to obstruct
4 relief and were (indiscernible) that they were delaying. I
5 just wanted to point out that, you know, we asked Your Honor
6 nearly a year ago for relief from the stay to pursue our
7 insurance coverage action and the Debtors approached us in
8 July and said, hey, would you like to negotiate?

9 We said, yes. We didn't hear anything back from
10 them again until October when they ignored a response and
11 said would you like to negotiate?

12 We said sure, but if it doesn't work out, we'd
13 like to get relief from stay to finish resolving these
14 issues. So, we have absolutely not refused (indiscernible);
15 it's been the opposite. (Indiscernible) impatient while
16 we've been waiting for some further resolution and the Court
17 directed at our motion at our hearing on the motion for
18 relief from stay.

19 Something else that was said in terms of the
20 presentation that is really critical, they said there should
21 be a single voice, but what they're really asking for is
22 three voices. They're asking for other groups to represent
23 not the Debtors' interests or the insured's interests, but
24 the interests of creditor groups. And, certainly, to the
25 extent they had a settlement or something of that nature,

1 those parties are going to have the right to weigh in and we
2 understand the desire to build consensus on that and don't
3 really have a problem with that, but we do have problem with
4 having three parties in our litigation multiplying the
5 litigation, which is not in the estate's best interests;
6 It's going to multiply the amount of work that's required.
7 There's been no allegation and there's no contention that
8 the Debtors don't want to maximize their -- the value of
9 their insurance. They're represented by one of the largest
10 and career insurance groups in the country at Reed Smith.

11 And if we have three parties in our case, the
12 other half is another issue, as much as we'd like this done
13 as soon as possible, I have serious doubts, Your Honor, that
14 an insurance litigation is going to be finished before this
15 confirmation.

16 We're going to then have parties and the
17 litigations who represent committees that will be most
18 likely dissolved. I know the stipulation doesn't control
19 the issue of what happens but that creates a very serious
20 concern about delay and problems in our ensuing coverage
21 litigation.

22 In fact, Your Honor, just -- I don't see the
23 benefit, on a cost benefit or any other basis, to create
24 those future problems in litigation when the Debtor's
25 perfectly competent and willing to step in and do this.

1 We have no problem if they consult with the
2 committees, but the committees don't need to be parties.
3 The committees being parties, not to represent the estate's
4 interests, but to represent their own, which is what they're
5 saying. They're there to represent the interests of all
6 these creditors. It's what's been alleged in the papers and
7 it was what was alleged today.

8 There's no need for it in this case. The Debtors
9 have -- are perfectly capable of funding this litigation.
10 They're perfectly capable of pursuing it.

11 It's -- you know, we're happy that they can reach
12 consensus with these groups on something. I'm sure they're
13 -- that can aid in their discussions but it -- it's got
14 nothing to do with it -- with the pursuit in this litigation
15 in an effective manner and efficient manner which is in the
16 estate's interests.

17 Which is why we raised our pending lift stay
18 motion. We're happy, Your Honor -- we recognize that either
19 way there's some response and not on notice. We're happy to
20 file a notice and have this heard.

21 We frankly were waiting and hoping that there'd be
22 some resolution or remediation before (indiscernible) this
23 motion prompted it.

24 And so, Your Honor, we think --

25 THE COURT: That's the problem with telephonic

1 hearings. I can't -- you have more to say, I guess.

2 MR. CALHOUN: No, go ahead, Your Honor.

3 THE COURT: No, no. I thought you might have been
4 done because there was a pause. But you were just catching
5 your breath.

6 MR. CALHOUN: Yeah. I was -- I was just looking
7 at my notes because they're a little bit scrambled. But,
8 yes, Your Honor, you know, so in short, we think there's
9 good reasons here not to interfere with the state law
10 standing requirements that would ordinarily -- ordinarily
11 would preclude these third parties from participating in
12 this litigation where there's no need to have them in there
13 from a funding or from a motivation standpoint.

14 It avoids any conflict with state law or between
15 other districts and circuits and, frankly, Your Honor, if
16 the term sheet that's proposed is incorporated into the plan
17 and that plan is confirmed, these creditor parties are going
18 to replace the Debtor down the road anyway and, you know,
19 that might be a more appropriate time to deal with that
20 issue.

21 THE COURT: Okay. Then you wouldn't raise
22 (indiscernible) cases then?

23 MR. CALHOUN: (Indiscernible) I can answer -- no,
24 Your Honor. What I'm saying is if what they really want is
25 to control the insurance litigation, if the plan proposes

1 that creditors become the new owners of the company, which
2 is my understanding of what was proposed, when they become
3 the new owners of the company, they'll be in control of
4 their insurance litigation.

5 THE COURT: Okay.

6 MR. CALHOUN: They're really sort of prejudging
7 that issue by asking that the -- not co-counsel for the
8 estate, but joint parties is what they're asking for, Your
9 Honor. They're not asking, let's have one voice on behalf
10 of the Debtors in this insurance litigation. Let's have
11 three voices which is not quite the same thing.

12 THE COURT: Okay. Very well. Anyone else have
13 anything more to say?

14 MR. SHORE: Your Honor, Richard Shore on behalf of
15 the ad hoc committee and just very, very quickly.

16 Mr. Calhoun said that -- that the Debtor and the
17 two committees reached out to take -- regarding settlement
18 to take -- said, sure, you know, let's sit down and they
19 didn't hear back from us.

20 What Mr. Calhoun left out is the take place, the
21 condition, on its willingness to sit down with us which was
22 that we agree or the Debtor agree that any disputes
23 regarding insurance coverage be resolved through
24 arbitration.

25 Obviously, that was not an acceptable condition to

1 proceeding with settlement negotiations.

2 Mr. Calhoun also said that -- and I should say,
3 you know, more broadly, we did seek to negotiate with all of
4 the insurers to enter into settlement negotiations. They
5 would have got little, not no, but little traction.

6 We think approving the stipulation and allowing
7 the Debtor and committees to initiate litigation will focus
8 the insurers on the need to resolve the coverage issue,
9 enhance prospects of settlement and, to the extent that we
10 can't settle during the bankruptcy case, we'll start this --
11 this -- the insurance disputes on the road to judicial
12 resolution sooner rather than later. So we think that's
13 very important.

14 And then, finally, Mr. Calhoun said that it was
15 unlikely that the litigation would be resolved during the
16 bankruptcy case. That, in our view, is a reason to approve
17 the stipulation, not not to approve it.

18 It would create approving a stipulation allowing
19 the committee -- the committees and the Debtor to work
20 together in coordination now, will create a smooth
21 transition to what happens, post-confirmation.

22 THE COURT: Okay. Thank you. All right.

23 I have before me a motion by the Debtors in these
24 cases for approval of a stipulation between the Debtors and,
25 on the one hand, and the official unsecured creditors

1 committee and the ad hoc committee of governmental entities,
2 of states and governmental entities, that is -- which I will
3 refer to as the ad hoc committee.

4 With respect to the Debtors' insurance causes of
5 action, the Debtors are parties to many difference insurance
6 policies and, as often happens in bankruptcy cases involving
7 rights to insurance, as well as outside of bankruptcy, there
8 appear to be disputes or potential disputes between the
9 Debtors and their insurers about the extent of coverage
10 under those policies.

11 The stipulation is brief and provides, first -- so
12 the terms of the stipulation are that the two committees are
13 granted leave and shall have joint standing with the Debtors
14 to assert, litigate and resolve any and all claims, causes
15 of action, disputes, or other matters regarding the Debtors'
16 insurance causes of action on behalf of the Debtors'
17 estates.

18 It is, I believe, clear, in particular because of
19 the last clause of that paragraph one of the stipulation but
20 also based on the representations made on the record today,
21 that standing and the stipulation as a whole pertains to
22 only the Debtors' estates' causes of action in respect of
23 their insurance policies.

24 The committees acknowledge that they currently do
25 not have their own causes of action in respect of the

1 insurance policies; i.e., they don't have direct action
2 rights at this time and they're not under the stipulation
3 being conferred direct action rights or such standing or
4 even derivative standing but, rather, if I granted the
5 stipulation, standing along with the Debtor, in each case,
6 on behalf of the Debtors' estates with respect to the
7 Debtors' insurance causes of action.

8 The stipulation also prescribes when the Debtors
9 can seek approval of a settlement of causes of action and
10 prescribes the rights of the two committees and prohibits
11 their ability to seek approval of any settlement of the
12 insurance causes of action without the Debtors' consent.

13 That's in paragraph two of the settlement and then
14 finally in paragraph three of the settlement provides that
15 the parties, that is the Debtors and the two committees,
16 shall confer and work cooperatively regarding litigation of
17 the Debtors' insurance causes of actions and the parties
18 shall endeavor to make all decisions by agreement among the
19 parties subject to applicable law.

20 Given that paragraph and the representations in
21 the Debtors' reply to the sold objection to the motion,
22 which is by one of the insurers, Ironshore Specialty
23 Insurance Company, which people have been referring to in
24 this matter by its former name, T-I-G or TIG Specialty
25 Insurance Company, they will work cooperatively to proceed

1 with any litigation efficiently from the perspective of the
2 Debtors' estate and, of course, will also obviously work
3 cooperatively because they need to, under paragraph two of
4 the settlement, with regard to any settlement negotiations.

5 The Second Circuit has well developed case law on
6 the conference of standing on third parties where standing
7 is, by statute, conferred only on the trustee or a debtor-
8 in-possession, where the conference of standing would permit
9 the third party to have standing to pursue estate causes of
10 action; i.e., causes of action on behalf of the debtor in
11 respect of its property and estate.

12 Starting with *Commodore International Ltd. V.*
13 *Gould (In Re Commodore International Ltd)*, 262 F3d. 96, 100,
14 (2nd Cir. 2001) and proceeding thereafter to *Blinka v.*
15 *Mirrored Industries USA, Inc., In Re Housecraft, Inc.*, 310
16 F3d., 64 (2nd Cir. 2002), the circuit has recognized that
17 where a trustee or debtor-in-possession with standing by
18 statute to pursue an estate cause of action or an estate
19 property right, agrees or consents to conferring that
20 standing on a third party, the court will grant that
21 standing and approve that agreement if doing so is (a) in
22 the best interests of the debtor's estate and (b) necessary
23 and beneficial to the fair and efficient resolution of the
24 bankruptcy case or proceeding.

25 In *Housecraft*, the Second Circuit recognized joint

1 standing; i.e., standing on behalf of both the debtor and a
2 third party at the same time to pursue estate causes of
3 action and that is what is being proposed here as well.

4 No creditor of the estate has objected to this
5 motion and, indeed, the three groups collectively
6 representing essentially all of the creditors, affirmatively
7 support the motion; that is, the two parties who are parties
8 to the stipulation along with the Debtors, the official
9 committee of unsecured creditors and the ad hoc committee.
10 And, in addition, the ad hoc committee of so-called non-
11 consenting estates affirmatively support the motion as, of
12 course, do the Debtors.

13 The only party objecting to the motion is one of
14 the potential litigation targets, TIG, an insurer. In the
15 Housecraft case, the circuit noted that where the debtor is
16 remaining as a party to a litigation and consenting to joint
17 standing, the court is well within its discretion to be
18 differential to that decision.

19 I believe that's particularly the case where all
20 of the key parties-in-interest in the case with an economic
21 stake in maximizing insurance proceeds recovery agree as
22 well to the conference of standing.

23 The objection asserts a few bases in support of
24 that objection. The first is that the grant of standing
25 might confuse or otherwise impair the Debtors' estates'

1 rights in respect of the Debtors' insurance claims.

2 The argument is that under applicable state law,
3 only the Debtor would have the ability to pursue these
4 causes of action at this time.

5 Of course, that is also the case or was also the
6 case in the Housecraft and Commodore cases with the
7 exception that the applicable statute there was a section
8 under Chapter 5 of the Bankruptcy Code that conferred
9 standing specially on the trustee or debtor-in-possession.

10 Nevertheless, the courts, as I have noted,
11 accorded standing to third parties to act on behalf of the
12 Debtor's estate.

13 The same logic, to my mind, would apply wherever a
14 third party would be acting literally on behalf of the
15 debtor's estate whether that cause of action be under state
16 or federal law.

17 The objector points to three or four cases decided
18 by the Bankruptcy Court for the District of Delaware as
19 authority for the contrary position that, in fact, the two
20 committees even if accorded standing to pursue the cause of
21 action would, in fact, not have such standing.

22 I have read those cases carefully and I believe
23 they are distinguishable and not, in fact, contrary to the
24 grant of standing here under paragraph one of this proposed
25 stipulation and order.

1 Perhaps the clearest example of that is the most
2 recent of those cases, In Re Citadel Watford City Disposal
3 Partners, 603 B.R. 897 (Bankr. D. Del. 2019). In that
4 case, pre-bankruptcy -- I'm sorry, during the bankruptcy
5 case, before confirmation of the Chapter 11 plan, the
6 official creditors committee was accorded standing to bring
7 estate causes of action.

8 Under the plan, the liquidation trustee was given
9 that status as the debtor's successor.

10 Nevertheless, the official committee brought the
11 litigation as a derivative matter for breach of fiduciary
12 duty claims under Delaware's Limited Liability Company Act,
13 or Limited Partnership Act.

14 Later, the liquidation trustee sought to modify
15 the caption of the case to include the liquidation trustee
16 as a plaintiff or the plaintiff, as a plaintiff rather,
17 asserting that this was just a procedural matter and of not
18 substantive import.

19 The court, Judge Kerry, in analyzing two prior
20 decisions by his colleagues, which I'll get to in a moment,
21 concluded, under the plain terms of the Delaware Limited
22 Partnership statute, that as of the time that the litigation
23 was commenced, the plaintiff did not have standing to bring
24 the cause of action.

25 At that time, when it was commenced, the official

1 unsecured creditors committee was the plaintiff and it was
2 bringing the action on a derivative basis which the Delaware
3 statute precluded.

4 The court, I believe, was clear that the
5 liquidation trustee was taking the standing, at that point,
6 as an assignee of the liquidation -- of the unsecured
7 creditors committee and concluded that the liquidation
8 trustee also did not have standing. Id. at 901 thru 902 as
9 well as 907.

10 The court's whole focus was on derivative
11 standing, not standing as conferred by the Bankruptcy Court
12 to bring causes of action on behalf of the estate but rather
13 derivative standing under Delaware law.

14 That was also the focus in the two cases that
15 Judge Kerry construed, Judge Gross's case, In Re HH
16 Liquidation, LLC, 590 B.R. 211 at 284 through 85, (Bankr. D.
17 Del. 2018) and In Re Pennysaver USA Publishing, LLC, 587
18 B.R. 445, 467 (Bankr. D. Del. 2018).

19 In each of those cases, the courts were focused on
20 the bringing of derivative claims for breach of fiduciary
21 duties owed to creditors of either -- of a limited liability
22 company in that case as opposed to an LP in the Watford City
23 case.

24 The whole focus was on derivative standing, not on
25 direct standing, as conferred by a court order which the

1 courts did not discuss at all.

2 I believe if that issue had been raised and
3 focused on by them, they would have reached the same result
4 which is that this was an action, if it could be brought by
5 the company, would be brought by the company and its
6 successors as opposed to someone suing derivatively in the
7 name of the company which was precluded by the Delaware
8 statutes.

9 I believe, therefore, that there would be no
10 impediments to standing here in a litigation that would name
11 the Debtor and the two committees as co-plaintiffs in each
12 case, acting on behalf of the Debtor.

13 Of course, if some court disagreed with that
14 analysis, although arguably it would now be collateral
15 estoppel as to TIG, since it's actually been litigated, the
16 solution would be simple. You would drop the two committees
17 and continue on with the Debtor or its successor under a
18 plan.

19 But that limited prospect, in my view, is no
20 reason to deny approval of the stipulation as not being in
21 the best interests of the estate.

22 The objection also argues that, as a cost and case
23 management matter, the stipulation is not in the best
24 interests of the estate. Again, I believe that the Debtor
25 has a low bar to meet here given that it would remain a

1 party to a litigation and given, in addition, the lack of an
2 objection by anyone except a potential target of the
3 litigation.

4 The other prong of the test bears a little more
5 scrutiny than that, however, i.e., the prong that requires
6 the conference of standing to be necessary and beneficial to
7 the fair and efficient resolution of the bankruptcy
8 proceedings.

9 TIG argues that it will now be confronting three
10 plaintiffs potentially instead of one and that would
11 multiply the conduct of any litigation and unnecessary --
12 and unnecessarily complicates settlement discussions.

13 I've considered that argument carefully; first,
14 whether the focus should even be on the other party to the
15 litigation as opposed to the conduct of the bankruptcy case
16 generally but even putting the focus on the former point, as
17 opposed to the later one, which I believe is probably not
18 the right result, but I will do it anyway, it appears clear
19 to me that in respect of settlement discussions and the
20 settlement process, in the context of this particular case,
21 having the two committees with standing to particulate in
22 settlement discussions under the construct of paragraph two
23 of this stipulation is beneficial not only to the estates
24 generally but also to the other party to those settlement
25 discussions; i.e., the insurer.

1 In this case, the Debtors have been clear, from
2 the start, and this is far from the norm in Chapter 11
3 cases, that they, in one form or another, will make all of
4 their assets, including their insurance assets, available
5 for their creditors.

6 The creditors, as a practical matter, therefore,
7 in their views, are of high importance in the Court's
8 determination as to the approval of any settlement, directly
9 involving the two committees therefore in settlement
10 discussions will cut short any further attack on a
11 settlement or litigation over a settlement, or further
12 negotiations to improve the terms of a settlement,
13 previously negotiated by the Debtors because the key
14 parties-in-interest are actually there with standing to
15 participate directly as a party with standing in the
16 settlement process.

17 As far as litigation is concerned, it is clear
18 from paragraph three of the stipulation as well as the
19 representations made in support of the motion that the
20 parties, as they have done here, will coordinate their
21 efforts so that I do not expect, and I believe it would be
22 perfectly incumbent upon a court or an arbitration panel to
23 so limit if my expectation is not followed by the Debtor and
24 the two committees to prevent unnecessary duplication of
25 argument and discovery and any other aspects of the

1 litigation that would be unduly burdensome and costly to the
2 defendant in that litigation.

3 As was the case here, the Debtors' counsel spoke
4 on behalf of the three parties. They coordinated on a joint
5 reply and I'm assuming that they would do so in similar
6 fashion with regard to any litigation pleadings and the
7 conduct of litigation hearings so that you would not have,
8 for example, three different parties standing up and
9 objecting to the admissibility of any particular exhibit or
10 question of a witness or the like. But that they would
11 coordinate those to be efficient.

12 I think a trial court would have -- be well within
13 its rights to rein in contrary behavior if it occurred
14 notwithstanding paragraph three of the stipulation.

15 So, it does not appear to me, even I were focusing
16 primarily on the insurers here, and their interests in fair
17 and efficient resolution of the bankruptcy proceedings, as
18 opposed to the fair and efficient resolution of the
19 proceedings generally, to conclude that this motion should
20 be denied.

21 To the contrary, I believe it should be granted.

22 I also believe it should be granted because I see
23 no reason for any delay in resolving the Debtors' insurance
24 claims and rights before confirmation of a plan.

25 Of course, the plan itself can modify again who

1 would have standing to pursue those claims and rights on
2 behalf of the Debtors' estate but there's no reason to wait
3 for confirmation of a plan to continue with the process
4 that's thus far has been, it appears to me, rather desultory
5 but now with the approval of this motion, I believe, will
6 gain speed along with seriousness given the joint
7 involvement of the two committees.

8 So, I will grant the motion and Mr. Kaminetzky you
9 can email me the proposed order. You don't need to formally
10 settle it on Mr. Calhoun but you should copy him on the
11 email so he can make sure it's consistent with my ruling and
12 doesn't change anything as far as the stipulation is
13 concerned.

14 MR. KAMINETZKY: Thank you, Your Honor.

15 THE COURT: There -- as noted, there's no motion
16 currently before me scheduled for a hearing for relief from
17 the automatic stay by TIG, Of course, with proper notice, I
18 would hear such a motion although I would hope that, at this
19 point, now that the lines of authority are clear, the
20 parties will engage in trying to resolve these issues before
21 sending them to litigation, whether that would be in this
22 Court, in a district court or in an arbitration.

23 So I think that concludes this matter and we can
24 move on to the next matter on the calendar.

25 MR. KAMINETZKY: Yes, Your Honor.

1 Again, Ben -- Benjamin Kaminetzky. I'm going to
2 turn the virtual podium over to my colleague, Jim McClammy
3 for items two and three on the agenda.

4 THE COURT: Okay.

5 MR. MCCLAMMY: Good morning, Your Honor.

6 Jim McClammy of Davis Polk on behalf of the
7 Debtors.

8 Items two and three are the motions that were
9 brought pro se by Ms. Deborah Clonts; one motion for claim
10 payment and that, two, a motion, and amended motion for the
11 lifting of the automatic stay.

12 I believe I see that Ms. Clonts is on the phone.

13 THE COURT: Right.

14 MS. CLONTS: Yes, I'm here.

15 THE COURT: (Indiscernible) what I was about to
16 say. So Ms. Clonts, you're here. You're representing
17 yourself; is that correct?

18 MS. CLONTS: Yes.

19 THE COURT: Okay. And it's C-L-O-N-T-S.

20 MS. CLONTS: Yes, that's correct.

21 THE COURT: Okay. So I have reviewed your motion
22 for payment as well as the motion and amended motion for
23 relief from the automatic stay.

24 MS. CLONTS: Your Honor, if -- uh-huh.

25 THE COURT: So I just want to let you know that I

1 have reviewed those as well as the Debtors' objections to
2 them.

3 MS. CLONTS: Uh-huh.

4 THE COURT: But if you want to say anything more
5 in support of those motions, you could do that now.

6 MS. CLONTS: Okay. Before I was making a claim
7 for an exception. It wasn't just claim payments. That's
8 why I was motioning for the lift of stay or I'm not sure
9 because, you know, clearly I'm not an attorney.

10 But I'm not sure if it's called the lift of stay
11 or relief.

12 THE COURT: Either term is fine. Relief from the
13 stay or lift of the stay.

14 MS. CLONTS: My term is fine?

15 THE COURT: Yeah.

16 MS. CLONTS: Okay. Yeah. So that's what I was --
17 that's what I came to argue was the crime fraud exception
18 and if that's okay, I will -- I will continue with that.

19 THE COURT: Well, again, I've read -- I've read
20 your pleading. So it's okay for you to continue with, you
21 know, to make an oral argument, too, or you can just rest on
22 the pleading; either one.

23 MS. CLONTS: Okay. And to be clear, I didn't -- I
24 have no idea that the UCC was working on this when I started
25 this, just to be clear. I wanted to state that.

1 It started with me seeing someone file a motion
2 for a claim payment and I just thought, that's easy. So I
3 filed one. And then I was issued a hearing and while I was
4 researching for that hearing, I stumbled across the crime
5 fraud exception and I thought, well, that sounds easy.
6 Perdue just pled guilty to fraud.

7 So I went ahead and filed the crime fraud
8 exception. It seemed like an open and closed case.

9 So I motioned for the lift of automatic stay
10 because, as I understood it, that's what you had to do to
11 invoke the crime fraud exception. It seemed justified.

12 And with Perdue's strategic and well planned
13 bankruptcy, it just seemed that Perdue and the Sacklers were
14 trying to save billions of dollars in litigation and they
15 could afford excellent attorneys and I just -- I just
16 thought that that didn't seem fair and it seems, to me, that
17 the attorneys are the only ones making any money in this.
18 The victims are -- are not getting paid and, when they do
19 get paid, it seems that it'll just be pennies on the
20 dollars.

21 So the Sacklers breached their fiduciary duty by
22 transferring huge amounts of money anticipating litigation.
23 They transferred it out of Perdue to overseas trusts in an
24 attempt to hide assets from creditors.

25 So that was their -- qualified for their fraud,

1 crime fraud exception.

2 Perdue also pled guilty to fraud all the way back
3 to 2007 and now 2020. Their aggressive marketing tactics,
4 the -- the thing that you were just talking about, the
5 derivative fiduciary duty, that qualifies for that.

6 The directors also failed and breached their
7 fiduciary duty when they knew the company employees were
8 breaking the law and they permitted it.

9 My damages, most importantly, are the -- is the
10 loss of my daughter and up and down the docket is all, you
11 know, many, many documents and many, many exhibits. You
12 know more than I do because you've probably seen the
13 unredacted ones.

14 And they have been before Congress, taken
15 responsibility, full accountability for everyone to see.
16 And I just believe that when the law for this is applied to
17 this case that it brings it to the level of meeting the
18 burden for crime fraud exception.

19 Thank you, Your Honor.

20 THE COURT: Okay. Thank you. And, again,
21 Mr. McClammy, I've read the pleadings on this. So you
22 should assume that but I'm happy to hear brief oral argument
23 if you want to do that or you can rest on the pleadings.

24 I think you may still be on mute, Mr. McClammy.

25 MR. MCCLAMMY: I'm sorry about that, Your Honor.

1 Thank you.

2 I think unless there are specific questions that
3 Your Honor has for the Debtors, we will rest on our
4 pleadings and simply reiterate, as this Court is aware, you
5 know, the import of the stay to these cases and moving them
6 forward and the fact that the Debtors and the other
7 constituents in this case, you know, remain very much
8 focused on bringing these cases to a conclusion for the
9 benefit of all the -- all of Perdue's creditors and the
10 public in general.

11 But, again, if Your Honor has specific questions,
12 happy to answer those.

13 THE COURT: Okay. That's fine. Thank you.

14 All right. I have two motions before me by
15 Ms. Clonts, each of which is opposed by the Debtors in these
16 Chapter 11 cases.

17 The first motion is a motion for payment of
18 Ms. Clonts' claims in these Chapter 11 cases.

19 There were four claims filed by her and they're
20 each entitled, if allowed, ultimately to payment from the
21 Debtors' estates. The claims are unsecured and they're pre-
22 petition claims; i.e., claims for harm that occurred to Ms.
23 Clonts based on the death of her daughter before the start
24 of these bankruptcy cases.

25 Ms. Clonts is not the only person who has filed

1 such claims in these cases. In fact, there are tens of
2 thousands of such claims filed against the Debtors
3 unfortunately for the claimants as well as claims by almost
4 all of the states in the United States, thousands of other
5 governmental entities and Indian Tribes, insurers,
6 hospitals, and other non-individual entities.

7 The amount of claims filed in this case, the
8 dollar amount is staggering and the Debtors, with the
9 official unsecured creditors committee, which is the
10 fiduciary for all unsecured creditors, and the ad hoc
11 committees in these cases, representing the states and other
12 governmental entities, as well as specific types of
13 claimants, such as the ad hoc committee of NES babies, and
14 insurers, have been addressing, since the start of these
15 cases, how to distribute to all of the claimants the maximum
16 amount of value that can be distributed.

17 The first motion, as I said, seeks payment now of
18 Ms. Clonts' claim. She acknowledges that she saw a similar
19 motion made earlier in these cases by a claimant, like
20 herself, who tragically lost a child and believed that
21 making such a motion and the grant of such a motion would be
22 relatively simple.

23 However, the grant of such a motion runs contrary
24 to a fundamental principle of bankruptcy law, which is why I
25 denied the prior motion; namely, it is highly unusual,

1 unless there's a net benefit to the other creditors, to pay
2 a pre-petition, unsecured claim before similarly situated
3 claims are paid.

4 The fundamental principle of the Bankruptcy Code
5 is to prevent some creditors from getting a leg up over
6 other creditors in the treatment of their similar claims
7 but, rather, to have that treatment apply to all claims
8 under, in the case of the Chapter 11 case, a Chapter 11
9 plan, that is negotiated as the Debtors have been
10 negotiating with key fiduciaries for creditors and then
11 ultimately proposed, on notice to everyone, and confirmed or
12 not by the Bankruptcy Court.

13 It would unduly prefer Ms. Clonts over the other
14 claimants to grant her motion now for payment and,
15 therefore, I will deny the motion.

16 I will similarly deny the motion for relief from
17 the stay which, to the extent it doesn't seek immediate
18 payment, would seek the ability to litigate the unsecured
19 claim that Ms. Clonts has filed in a non-bankruptcy forum
20 and I believe then, at least reading between the lines of
21 the motion, have it be paid.

22 Again, it is rare to have relief from the
23 automatic stay under 362(a) of the Bankruptcy Code to pursue
24 litigation of a pre-petition claim even without having it be
25 paid, just to have it be litigated unless unique

1 circumstances apply such as the litigation is fully insured,
2 or the litigation is very far advanced and it would be more
3 efficient to have the claim be litigated in the forum that
4 has been presiding over the matter or the like.

5 The factors applied by the Second Circuit in the
6 In Re Sonnax Industries case, none of those factors applies
7 here.

8 Ms. Clonts has stated, and I appreciate she's not
9 a lawyer, that she believed that a so-called crime fraud
10 exception would provide for relief from the automatic stay
11 here and noted that the Debtors, Perdue, have already pled
12 guilty to certain crimes in the District Court of the
13 District of New Jersey during the course of these cases.

14 However, there was no such general exception or
15 exclusion from the automatic stay provided for in the
16 Bankruptcy Code. Section 362(b)(4) provides that certain
17 sections of the automatic stay do not apply to the
18 commencement or continuation of an action or proceeding by a
19 governmental unit to enforce such governmental unit's police
20 and regulatory power including the enforcement of a judgment
21 other than a money judgment obtained in an action or
22 proceeding by the governmental unit to enforce such
23 governmental unit's police or regulatory power.

24 But, by its plain terms, that exception to the
25 automatic stay applies to governments, to governmental units

1 and would not apply to an individual such as Ms. Clonts.

2 Her motion also references a claim that her claim
3 would not be subject to any discharge in this case under
4 Section 523(a)(2) of the Bankruptcy Code.

5 Again, I recognize that Ms. Clonts is not a lawyer
6 but there are two points to make here. First, actions for a
7 declaration that the bankruptcy discharge does not apply to
8 a particular debtor under Section 523(a) of the Bankruptcy
9 Code are normally brought by an adversary proceeding rather
10 than a motion like this.

11 But, more importantly, by its plain terms, Section
12 523(a) of the Bankruptcy Code applies only to discharges of
13 individual debtors; i.e., people as interpreted by the
14 Second Circuit as the Second Circuit interprets the term
15 individual debtor.

16 These Debtors are not people. They're
17 corporations and other legal entities. For such entities,
18 Congress has a far more restrictive limitation on a
19 discharge. It is set forth in Section 1141(d)(6) of the
20 Bankruptcy Code. It says that notwithstanding paragraph
21 (1), which is the general discharge provision for
22 corporations and entities other than people, the
23 confirmation of a plan does not discharge a debtor that is a
24 corporation from any kind -- from -- of a kind of a debt
25 specified in paragraph (2)(a) or (2)(b) of Section 523(a)

1 that is owed to a domestic governmental unit or owed to a
2 period as the result of an action filed under Subchapter 3A
3 of Chapter 37 of Title 31 where a similar state statute
4 which, in essence, is a type of statute that lets a person
5 step into the shoes of a governmental unit like a
6 whistleblower statute.

7 Again, Ms. Clonts is not a governmental unit and
8 doesn't fall into that exception.

9 So, Ms. Clonts, I understand fully that you would
10 like to have some payment from the Debtors' estate as soon
11 as possible. That payment, however, cannot come ahead of
12 payments to (indiscernible). They should be made together
13 once your and their claims are allowed.

14 The parties have been negotiating a process, a
15 structure for reviewing claims like yours, and considering
16 whether they should be allowed in a way that's efficient and
17 cost effective for people like yourself as well as the
18 Debtors that tries to minimize lawyer involvement, for
19 example.

20 Those sorts of procedures have been adopted in
21 many cases where there are claim like yours and I am
22 assuming that if and when a plan is confirmed in this case,
23 such a procedure will be part of it and your claim will be
24 reviewed and whether it be allowed or disallowed or reduced,
25 but once that happens, there will be distribution on it as

1 that -- and that that same process will apply to everyone
2 else who has filed a claim like yours.

3 But that process is a collective one. An enormous
4 number of people are affected by these cases and it has
5 taken as long as we have taken in this case to get to a
6 point near to which such a plan can be filed and confirmed.

7 If the Debtor warrants a discharge, if that plan
8 is a truly organization plan as opposed to a liquidation
9 plan, then the Debtor will get a discharge except to the
10 extent it is asserted it is not entitled to one under the
11 section I just read from, Section 1141(d)(6).

12 But, again, that applies to governmental units,
13 i.e., the states and other governmental entities if they
14 want to pursue that type of relief.

15 But, at this point in the case, while people are
16 still dealing with the ultimate structure of a plan, and the
17 resolution of all of the Debtors' estates' claims against
18 third parties, including claims for alleged avoidable
19 transfers, which you have referred to, i.e., transfers of
20 value out of the Debtors for less than fair value or fair
21 consideration, where the Debtors were insolvent or the like.

22 But, again, that needs to be resolved before there
23 can be distributions to creditors. And I can tell you that
24 the tea parties in this case, whether they be the Debtors,
25 the creditors committee or the ad hoc committees of the

1 states and governmental entities and other ad hoc
2 committees, I believe have been doing their utmost to
3 resolved those issues as promptly as they can. And I have
4 been doing my utmost to make sure that they focus on that
5 process in a way that takes into account the risks that they
6 face of not reaching an agreement on the process and the
7 rewards of either reaching an agreement or not reaching one.

8 I believe that that process is coming to a close.
9 I set a deadline on it. And I am looking at I hope a
10 largely, if not entirely, consensual plan before the spring
11 and confirmation in the spring of this year.

12 We'll see if that can happen. But I cannot move
13 the process any faster than it is moving at this point.

14 So I will ask Mr. McClammy to submit an order to
15 chambers denying both of the motions. That order will make
16 it clear that it is not not denying or disallowing your
17 underlying claims. You file those claims and they will be
18 dealt with under a plan.

19 MR. MCCLAMMY: We will take care to submit that
20 order, Your Honor.

21 MS. CLONTS: Thank you.

22 THE COURT: Okay.

23 MS. CLONTS: Thank you. Thank you, Your Honor.

24 I'm so sorry that I had -- I got involved in this and I
25 didn't know what to do. I didn't know --

1 THE COURT: No. There's no reason --

2 MS. CLONTS: -- you know --

3 THE COURT: -- there's no reason to -- ma'am,
4 there's no reason to apologize at all.

5 MS. CLONTS: Okay.

6 THE COURT: This --

7 MS. CLONTS: All right.

8 THE COURT: -- is -- these are complicated issues.

9 MS. CLONTS: Uh-huh.

10 THE COURT: The Bankruptcy Code is something that
11 lawyers work with their entire career and they still learn
12 new things that are in it.

13 MS. CLONTS: Yes.

14 THE COURT: So we shouldn't -- you shouldn't
15 apologize. There's no reason to.

16 But I did want to lay this out carefully so that
17 perhaps --

18 MS. CLONTS: Uh-huh.

19 THE COURT: -- the transcript can be pointed to if
20 there are other people, like yourself, who read things in
21 the press and think, oh, well, maybe I can get paid now or,
22 you know, why aren't payments being made now.

23 MS. CLONTS: Right.

24 THE COURT: If they reach out to the Debtors or
25 the creditors committee, the Debtors can send them this

1 section of the transcript, at least to see how I analyzed it
2 in your situation and if there's a similar, you know, they
3 could then see it. So --

4 MS. CLONTS: Well, you made it very clear. I
5 understand completely.

6 THE COURT: Yes. Okay. All right.

7 MS. CLONTS: Thank you so much.

8 THE COURT: And, of course, the -- the claims
9 you've asserted are serious. I mean, I --

10 MS. CLONTS: Uh-huh.

11 THE COURT: -- am not dealing with the merits of
12 those claims at all. They're serious claims and it's
13 because of the seriousness of those claims and tens of
14 thousands of others, that the parties have been working so
15 hard in this case and by the parties, I mean, not just the
16 Debtors --

17 MS. CLONTS: Right.

18 THE COURT: -- but the various committees to try
19 to get a fair resolution for everybody.

20 MS. CLONTS: Right. I'm just so relieved this is
21 over. So thank you again.

22 THE COURT: It's not over yet, I'm afraid. I'm
23 just (indiscernible) --

24 MS. CLONTS: No, I mean -- I mean, for me, this
25 part of the --

1 THE COURT: Oh, okay.

2 MS. CLONTS: -- this, I'm just glad this is over.

3 Thank you.

4 THE COURT: Okay. Very well. Thank you.

5 MS. CLONTS: Bye-bye.

6 THE COURT: Okay. All right. I think the next
7 matter on the calendar apropos the section that I was just
8 talking about is the Debtors' request for a further
9 extension of the time to object to dischargeability under
10 Bankruptcy Rule 4007(c) and 1141(d).

11 I think that's the next matter. I don't know who
12 was handling that from Debtors' side.

13 MR. MCCLAMMY: Yes, Your Honor. This is Jim
14 McClammy. I believe that will be handled by Christopher
15 Robertson for us.

16 THE COURT: Okay.

17 MR. ROBERTSON: Good afternoon, Your Honor. For
18 the record, Christopher Robertson, Davis, Polk and Wardwell
19 on behalf of the Debtors.

20 Can I be heard clearly in the Court?

21 THE COURT: Yes.

22 MR. ROBERTSON: Oh, thank you, Your Honor.

23 Your Honor, turning to agenda item number four,
24 very briefly, Ms. Clonts also objects to entry of the fifth
25 amended order extending time to object to dischargeability

1 of certain debts.

2 I understand this objection remains live
3 notwithstanding the prior discussion.

4 THE COURT: But this is the only objection, I
5 gather, too. There's been no other -- no other responses to
6 the motion?

7 MR. ROBERTSON: That -- that is correct, Your
8 Honor. I guess let's skip to the end.

9 We initially filed this -- the request to extend
10 the determination deadline back on December 23rd, 2019.
11 There have been no objections to the extension that any, you
12 know, back then or any subsequent time until the present.

13 THE COURT: Okay. And have there been any changes
14 to the proposed order?

15 MR. ROBERTSON: Just updating dates, Your Honor.

16 THE COURT: Right. But, I mean, no changes from
17 that -- from those dates, those updated dates.

18 MR. ROBERTSON: No, Your Honor.

19 THE COURT: Okay. All right.

20 And I'm assuming no one has anything further to
21 say on this motion?

22 All right. I will grant the motion for the same
23 reasons that I've granted the prior extensions. I believe
24 that, at this time, in these cases, it would be a sideshow
25 and an undue burden on the governmental entities and any

1 other entity to have to face the deadline under Rule 4007 to
2 seek a declaration of non-dischargeability under Section
3 523(a) to the extent that such a deadline applies and that
4 it's appropriate to extend that deadline so the parties can
5 see whether they can negotiate -- include negotiations on a
6 plan that would deal with dischargeability issues among many
7 others. Debtors have sought this relief themselves. They
8 would be the ones benefitting from the imposition of the
9 deadline. If they're prepared to extend it, and no one else
10 has objected, other than Ms. Clonts, who I believe now
11 understands that the motion really doesn't pertain to
12 directly to her in any event.

13 So I will grant the motion and you can email that
14 order to chambers.

15 MR. ROBERTSON: Thank you, Your Honor.

16 And, at this time, I would like to turn the podium
17 back over to my colleague, Benjamin Kaminetzky.

18 THE COURT: Okay.

19 MS. KAMINETZKY: Your Honor, that brings us to --
20 this is Benjamin Kaminetzky again of Davis Polk. Good
21 afternoon.

22 That bring us to the final items on the agenda,
23 which is agenda items five, six, seven and eight.

24 I will be addressing those.

25 I'll turn things over to the media intervenors

1 shortly to address the specific objections that remain to
2 the sealing and redactions proposed by the Debtors and the
3 Sackler families.

4 But I thought it would be helpful before we jump
5 into merits to give the Court a brief overview of what's
6 been going on and kind of the numerous docket entries and
7 what's actually still --

8 THE COURT: I think you may have hit -- I think
9 you may have hit mute briefly, Mr. Kaminetzky.

10 MR. KAMINETZKY: Oh, I'm sorry. I -- what I
11 propose to do is just to kind of update Your Honor on where
12 we are and what's still at issue because I think, quite
13 frankly, it'll make Your Honor happy as well as put
14 everything in context.

15 So -- and then I'll hand it over to Ms. Townsend's
16 representing the media parties to present any issues that
17 remain.

18 So, as you know, back in September, the UCC filed
19 two motions to compel the production of privileged documents
20 from the Debtors and the members of the Sackler families.

21 Motions to which the Debtors and the UCC reached a
22 negotiated resolution back in November.

23 Now, in connection with the UCC's privileges
24 motions, over 550 documents totaling almost 14,000 pages
25 were initially filed under seal or in case -- in the case of

1 briefing heavily redacted an immense amount of material by
2 any measure and it's these materials that were the subject
3 of the media intervenors motions.

4 As Your Honor may recall, many of those papers
5 were initially filed under seal because they were, you know,
6 constituted documents produced and marked confidential
7 pursuant to the relevant protective orders entered in this
8 case or referenced such materials,

9 At the time, no party had objected to this sealing
10 until the media intervenors filed their motion in late
11 November.

12 It should not be left unsaid that there's no small
13 amount of irony to the fact that the parties are here today
14 on the media intervenors' motion to unseal.

15 The vast majority of the materials that are
16 subject to the motion were filed by the UCC and the
17 Sacklers, not by the Debtors. And large swaths of it was
18 the Debtors' business material. Hundreds, or multi hundred
19 page presentations to the Debtors' board of directors
20 containing detailed information about the Debtors' business
21 and product offerings, quarterly reports to the board and
22 the like.

23 Now why was this material filed? The answer is
24 simple. The bulk of the exhibits filed by the UCC and the
25 Sacklers are -- were intended to go to the merits of the

1 parties' underlying liability argument and were filed so
2 that the parties could "tell their stories" through these
3 two discovery motions and specifically through various
4 arguments concerning the so-called crime fraud exception to
5 the attorney-client privilege.

6 But it was the Debtors who were caught in the
7 middle of the strategic decisions of the UCC and the
8 Sacklers to litigate by their stories, by proxy, through
9 these documents.

10 Now, in light of the fact that the hearing on the
11 privileges motions was until Monday evening scheduled to
12 proceed today, it was the Debtors who had to shoulder the
13 burden of reviewing thousands upon thousands of pages of
14 documents over the holidays, often page-by-page, and even
15 line-by-line.

16 The Debtors were and remain quite supportive of
17 the adjournment of the UCC's privileges motion and so the
18 Sacklers, so it means that the parties will continue to
19 dialogue.

20 But that doesn't change the fact, however, that
21 the Debtors were forced to evaluate reams of information
22 that we most assuredly, we, the Debtors, wouldn't have filed
23 and we had to do this in an extremely compressed timetable
24 demanded by the media parties.

25 With that out of the way, let me be crystal clear

1 about one thing. We agree, we fully agree, with the medial
2 intervenors that transparency in judicial proceedings is of
3 paramount importance not only to the parties and to the
4 Court, but also to the press and the American public.

5 There is intense public interest in these specific
6 Chapter 11 cases, understandably so. Indeed, the Debtors
7 recognize that -- that as these cases enter their final
8 stages hopefully the public's impressed interest in these
9 proceedings is almost certainly to continue unabated.

10 And, for these reasons, the Debtors have been and
11 continue to be committed to transparency in these cases, a
12 commitment that I believe has been exemplified yet again by
13 the Debtors' response to the media intervenors motions to
14 unseal.

15 In short, over just a handful of weeks, a good
16 portion of which fell over Christmas and New Years, the
17 Debtors worked diligently to voluntarily unseal or authorize
18 the unsealing of the vast overwhelming majority of the
19 Debtors' information that was filed in connection with the
20 UCC privileges motion. Again, mostly by parties other than
21 the Debtors.

22 And I don't think it would be an unfair or an
23 exaggeration in the slightest to say that the redactions
24 that remain are targeted and exceedingly narrow, in many
25 instances mere words or pages in exceedingly lengthy

1 documents.

2 Now as Ms. Town said -- Townsend informed the
3 Court last night, the press and the parties have met and
4 conferred extensively and narrowed their disputes to
5 essentially two documents with redactions on a total of 42
6 pages. That's .3 percent, not three percent, .3 percent of
7 the total pages filed in connection with the UCC's
8 privileges motion. And there was a remaining issue as well.

9 Before turning the podium over to Ms. Townsend,
10 let me dispense with the remaining issue, at least as to the
11 debtors. I don't speak to the Sacklers.

12 As Ms. Townsend informed the Court last night,
13 certain privilege log excerpts and related documents such as
14 compilations of individuals appearing on privilege logs that
15 were exchanged in discovery continued to remain under seal.
16 The debtors believe that withholding to be entirely
17 appropriate because, among other things, these materials
18 contain much information that has little or no relevance to
19 the case.

20 But, nevertheless, the debtors last night kept --
21 continued to consider the issue in good faith and can now
22 inform the Court, and we informed Ms. Townsend earlier
23 today, that the debtors do not now object to the unsealing
24 of the privilege log information so long as there is a
25 reasonable amount of time afforded to the parties to apply

1 redactions to any commercially sensitive information which
2 might be theoretically in the subject lines or personally
3 identifiable information, such as email addresses, which is
4 consistent with the redactions that the debtors have applied
5 without objection to the other materials.

6 So in light of that, and I believe we could get
7 that done, Your Honor, in the next two weeks or so. I
8 believe -- and then we could unseal that as well.

9 So I believe, Your Honor, we're down to literally
10 two documents. And to be clear, it's not two documents
11 entirely under seal, but sporadic redactions in only two
12 documents that are still at issue, at least with respect to
13 the media and to the debtors. And those are the documents
14 that Ms. Townsend identified last night, which is Mark Pries
15 Exhibit 137 as well as Leventhal Exhibit 123.

16 So, Your Honor, all that just to say is that we've
17 substantially -- I guess that would be an understanding.
18 We've narrowed the issues to certain redactions on two
19 certain documents that I think are still at issue.

20 But I now turn the podium over to Ms. Townsend who
21 we've been working with for the last several months and who
22 has been, quite frankly, a pleasure to deal with.

23 THE COURT: Okay. But before we do that, I just
24 want to -- I want to make sure the context for this is clear
25 in one respect.

1 There was extensive discovery in these cases
2 starting early in the cases between the creditors' committee
3 and the ad hoc committee of non-consenting states on the one
4 hand, and the debtors and the Sacklers on the other side,
5 not really on the other hand, the debtors and the Sacklers.

6 As part of that discovery, as is quite common,
7 customary, the parties, both the targets of the discovery
8 and the parties seeking discovery, agreed to protective
9 orders to be so ordered by me whereby they contemplated that
10 certain information provided in the discovery would remain
11 confidential and, in fact, at different levels of
12 confidentiality. That's a common practice to enable
13 discovery to proceed quickly without fights over what is
14 produced in the first instance.

15 But those orders, as is my practice and the
16 practice of the judges in the Southern District, contemplate
17 that they are subject to review and motions to unseal such
18 information by third parties, including, of course, the
19 press.

20 The debtors have on the calendar today motions to
21 seal documents under Section 107(b) of the Bankruptcy Code
22 and there are sealing orders in the case. But, again,
23 sealing orders under 107 also recognize, because they're
24 often sought on shorten notice, again, to permit pleadings
25 to be considered without fights over confidentiality by the

1 Court and other parties that have access to the full
2 information. But they are subject, again, to the rights of
3 others, including the press, to have the documents be
4 unsealed.

5 In all of these instances, the ultimate burden on
6 disclosure and more appropriately to prevent disclosure is
7 on the party who wants to prevent disclosure.

8 So I appreciate all of the work that the parties
9 have done to focus on what is properly now at this stage in
10 these cases fit for disclosure to the public and it is clear
11 to me that they've done it with a proper eye to the actual
12 law, which would require disclosure of almost everything,
13 and certainly the materials that have been disclosed, which
14 is almost everything and that we're now discussing a far
15 more constrained or limited set of items. In fact, we're
16 now down, as far as the debtors are concerned, to two pieces
17 of information.

18 This is all, of course, separate and apart from
19 the privilege motion. And I agree with you, Mr. Kaminetzky,
20 that the issue of the sealed documents is largely
21 precipitated by both the committee and the ad hoc committee
22 of nonconsenting states on the one hand and the Sacklers on
23 the other to litigate, not in front of me, but in public
24 eye, not a privilege motion, but to some extent the merits
25 of their respective positions vis-à-vis each other.

1 So that's just an inescapable fact as to the state
2 in which these cases were in when those documents were filed
3 and everyone had to deal with that. There was a period, of
4 course, where the parties were educating themselves and
5 ultimately the issues here are issues to be decided by a
6 court and not by public opinion. But I don't -- I certainly
7 do not fault anyone for precipitating the disputes that were
8 raised by the media intervenors.

9 So with that, I'm happy to hear from the
10 intervenors' counsel, Ms. Townsend.

11 MS. TOWNSEND: Thank you, Your Honor. And for the
12 record, Katie Townsend of the Reporters' Committee for
13 Freedom of the Press on behalf of the media intervenors, Dow
14 Jones & Company Inc., Boston Globe Media Partners, LLC and
15 Reuters News & Media, Inc.

16 As Your Honor is aware and as you and Mr.
17 Kaminetzky have already indicated, in December and January
18 the parties in this matter met and conferred without
19 participation from the media intervenors and ultimately
20 publicly filed in unsealed redacted form the vast majority
21 of the material that was previously sealed in its entirety
22 and that was the subject of the media intervenors' motions
23 to unseal.

24 We've since reviewed those publicly filed
25 materials and we've met and conferred with the relevant

1 parties who filed timely objections to the motions to
2 unseal.

3 At this point the media intervenors are in a
4 position to voluntarily withdraw their pending motions to
5 unseal without prejudice except as to 17 documents that we
6 contend are still improperly sealed or redacted. And those
7 documents, 17 documents, Your Honor, fall within two
8 categories identified in our reply. And I'll address both
9 of those categories briefly.

10 I'll start with two -- the two documents that Mr.
11 Kaminetzky referenced, Exhibit 123 to the October 14th, 2020
12 Leventhal declaration, and Exhibit 137 to the November 18th,
13 2020 Preis declaration. Those documents have been redacted
14 by the debtors purportedly on the ground that they contain
15 confidential commercial information within the scope of
16 Section 107(b).

17 Now, Your Honor, Section 107(a), as you know,
18 makes any paper filed in a bankruptcy matter like this one a
19 public record open to public inspection unless one of the
20 express enumerated exceptions to that disclosure mandate
21 applies. Those enumerated exceptions that are found in
22 Section 107(b) or -- and 107(c) are narrowly construed. And
23 as we explain in our briefing, the Second Circuit has
24 interpreted commercial information in this context to be
25 information that, if disclosed, would give an unfair

1 advantage to competitors by revealing details about the
2 entity's commercial operations.

3 With respect to 123, Exhibit -- excuse me, Exhibit
4 123 to the Leventhal declaration and Exhibit 137 to the
5 Preis declaration, the debtors assert the redactions are
6 warranted, and as Your Honor has already indicated they
7 therefore bear the burden of demonstrating that the
8 redactions falls within the scope of an exception to Section
9 107, and that there's a compelling need to preclude public
10 access.

11 It's the media intervenors' position that they
12 have not met that burden with respect to these two
13 documents. Exhibit 123 is a slide presentation dating back
14 to mid-2016 and we understand that the information redacted
15 from that presentation consists of internal projections
16 about exclusivity periods for certain products. It's our
17 understanding including opioid products.

18 Exhibit 137 is a 2017 memorandum from Purdue's
19 president and CEO, Mr. Landau expressing his views about the
20 challenges that have been facing the company. Large swats
21 of that memorandum are -- have been redacted and remain
22 under seal.

23 It's not at all clear and it's our position the
24 debtors haven't demonstrated that unsealing these documents
25 in their entirety, particularly given that they are at least

1 four or five years old at this point, would give an unfair
2 advantage to any competitor of Purdue Pharma. And for that
3 reason we argue that they should be unsealed.

4 With respect to the remaining 15 documents, and I
5 understand that the debtor's position with respect to these
6 has changed and so Mr. Kaminetzky didn't address them.
7 Those are privileged logs --

8 THE COURT: Well, why don't we ask, do the
9 Sacklers still oppose the unsealing of the privilege logs?

10 MR. JOSEPH: Your Honor, Gregory Joseph for the
11 Raymond Sackler family. Yes, that is the one thing that we
12 do oppose.

13 THE COURT: Okay. All right. I'm sorry to
14 interrupt you, Ms. Townsend, but I wanted to make sure that
15 you were arguing -- that you needed to argue on this point.
16 But you do, so go ahead.

17 MS. TOWNSEND: Thank you, Your Honor.

18 With respect to those documents, so those are the
19 privileged log materials, and they include excerpts of
20 privilege logs that were filed as exhibits in connection
21 with the UCC's privileges motion and those are currently
22 sealed -- that are currently sealed in their entirety.

23 So setting aside the debtor is the only party to
24 timely file an objection to the unsealing of the privilege
25 log materials and the only party to offer I would say any

1 form of a substantive argument for doing so is the Raymond
2 Sackler family party, and so I'll briefly respond. We've
3 done so a bit in our reply, but I'll briefly respond to what
4 I understand their arguments in favor of continued sealing
5 of those materials, what I understand those arguments to be.

6 First, in the written objections, the Raymond
7 Sackler family relies upon this argument that these
8 materials are not evidence and, therefore, they can be
9 sealed in their entirety. It appears to me that their
10 position is that the materials here are not judicial records
11 to which the common law presumption of public access applies
12 or that the common law presumption is weaker here.

13 Now to be clear, we disagree that these are
14 nonjudicial records. We've argued for their disclosure
15 under the First Amendment as well as Section 107 and as
16 we've pointed out --

17 THE COURT: Well --

18 MS. TOWNSEND: -- in our reply brief --

19 THE COURT: -- can I interrupt you on this point?

20 I want to make sure I have -- I want to -- I'm sorry to
21 interrupt you. I want to make sure I have the facts
22 straight on this. These are not just privilege logs that
23 were provided in discovery. They were actually filed on the
24 docket as exhibits to various declarations in the privilege
25 litigation, correct?

1 MS. TOWNSEND: That is correct, Your Honor. We do
2 not seek --

3 THE COURT: Okay.

4 MS. TOWNSEND: Our motions do not seek any unfiled
5 discovery material merely exchanged between the parties,
6 only material that was filed.

7 THE COURT: Okay. Okay. So you can go ahead. I
8 just wanted to make sure that was clear on the record.

9 MS. TOWNSEND: Thank you, Your Honor.

10 I think that my next point will sort of dovetail
11 with precisely that. We do -- it is our position, and as we
12 stated in our reply, that the interpretation of the Second
13 Circuit's decision in Brown v Maxwell is not right, but I
14 think that's a little bit besides the point because we have
15 not moved to unseal these materials under the common law
16 presumption of access because in bankruptcy proceedings the
17 common law presumption has been displaced by Section 107.

18 And so the question here is not, you know, whether
19 or not these are judicial records to which the common law
20 presumption applies and whether that right has been
21 overcome, but rather whether Section 107 applies and, if it
22 does, which it clearly does because Section 107(a) doesn't
23 just apply to any paper. And this is by plain language.
24 It's expressed in plain language. It applies to any paper
25 filed in a case under -- in -- under -- in bankruptcy.

1 So Section 107(a) plainly applies to these
2 materials because they were filed in connection -- they were
3 filed with the Court in this matter. The question then
4 becomes does an exception apply.

5 Now with respect to the privileged materials as a
6 whole, the Raymond Sackler family has not asserted that any
7 specific exception would, under 107(b) or (c) applies to
8 make those documents not properly unseal -- not -- doesn't
9 require them to be unsealed. And quite frankly, Your Honor,
10 I can't think of what possible argument that would be --

11 THE COURT: Well --

12 MS. TOWNSEND: -- if they are --

13 THE COURT: -- the only one I can really think of
14 here is the one identified by Mr. Kaminetzky, which is
15 personally identifying information might be in the privilege
16 log for some reason.

17 And you don't have any problem with that being
18 redacted, do you?

19 MS. TOWNSEND: No. And to be clear, I was
20 referring to the documents as a whole. I think to the
21 extent that there is -- that there are -- there is properly
22 with -- that there can be properly redacted, you know, non-
23 public personal identifying information, you know, we
24 wouldn't challenge the redaction of material that actually
25 does fall within an exception.

1 I think I would flag for Your Honor that it's my
2 understanding that the Sackler family parties are -- have --
3 are taking the position, and I'll be frank. We didn't
4 realize this until meet and confer discussions with their
5 counsel that some of the material would also necessarily
6 from their perspective need to be redacted because it
7 includes counterparty information, so business and
8 investment counterparty information.

9 And the basis that they've asserted for that,
10 which they sort of dealt with as a separate category in
11 their objections to our motions to unseal, is the Court's
12 May 1st, 2020 ruling which brought that material within the
13 scope of sort of a heightened level of protection under the
14 protective order governing discovery.

15 And I think our position there would -- is sort of
16 two-fold: One, the fact that there is a -- you know, the
17 propriety of the scope of a protective order governing
18 discovery, which is entered on a different standard, a good
19 cause standard, is not really what's at issue here. What's
20 at issue here is whether this material that was filed with
21 the Court is accepted from disclosure under Section 107.

22 So I would respectfully to the Sackler family's
23 counsel say that the existence of the protective order or
24 the fact that this material is subject to a protective order
25 that governs discovery is not relevant at this stage. In

1 fact, most of the material as you've indicated that has been
2 unsealed to date was subject to a protective over governing
3 its provision in discovery. And, again, those -- as Your
4 Honor's already indicated, protective orders certainly serve
5 different purposes in litigation than a sealing order does.

6 And you would -- we would contend that that
7 material also does not fall within one of the express
8 exceptions under Section 107. It's not confidential
9 commercial information. It's not trade secret information.
10 It's not research and development information, the specific
11 categories that have been identified -- that are identified
12 or expressly enumerated in Section 107(b).

13 And so for that reason, too, we would argue that
14 the privilege log materials should be disclosed. To the
15 extent that there are redactions, that that material that is
16 properly within the subject of an exception to 107, that
17 would be non-public TII, for example, that material could be
18 redacted, but those redactions have not been made. The
19 material has just been sealed in its entirety.

20 And I think, Your Honor, that really covers the
21 waterfront with respect to the material that's -- the 17
22 documents that we -- that are still at issue. I would be
23 happy to answer additional questions Your Honor has with
24 respect to those materials.

25 THE COURT: Well, I have a question for the

1 parties.

2 We have been looking for a complete version, both
3 redacted and unredacted, of Exhibit 123 to the Leventhal
4 declaration and Exhibit 137 to the Preis declaration and
5 don't have them. I would like someone to email those to
6 chambers immediately so I can look at them, both the
7 redacted and unredacted versions.

8 MR. HURLEY: Your Honor, this is Mitch Hurley with
9 Akin Gump on behalf of the official committee. We can
10 certainly take care of sending the Preis exhibit you
11 referenced. And whatever version of the Leventhal exhibit
12 we have we will send as well.

13 THE COURT: Okay. And, again, I need both the
14 complete and the redacted ones.

15 MR. KAMINETZKY: Well, Your Honor, we could --
16 this is Ben Kaminetzky. I'll have someone do that from my
17 office right away --

18 THE COURT: Okay.

19 MR. KAMINETZKY: -- both of them --

20 THE COURT: Thank you.

21 MR. KAMINETZKY: -- together.

22 THE COURT: Okay.

23 MR. KAMINETZKY: Your Honor, would you like to --

24 THE COURT: All right.

25 MR. KAMINETZKY: This is -- I'm sorry. Would you

1 like to deal with the privilege log issue with --

2 THE COURT: Yeah.

3 MR. KAMINETZKY: -- the Sacklers or --

4 THE COURT: We should deal with -- why don't we
5 deal with the privilege logs while I'm waiting to get those
6 other two exhibits.

7 MR. KAMINETZKY: Okay. So I will --

8 THE COURT: So I take that -- I think that means
9 Mr. Joseph?

10 MR. JOSEPH: Yes, Your Honor. May it please the
11 Court, thank you.

12 Your Honor, the only issue concerning the
13 privilege logs that I would like to raise is, first, it's
14 only relevant to the general challenges motion which has
15 been adjourned at the request of the UCC to see whether it
16 can be resolved. As -- and I'll come in a moment to the
17 fact that it has been overwhelmingly resolved so far.

18 But this motion, the general challenges motion,
19 hasn't been heard, may never be heard. And if it is heard,
20 we're talking about a series of entries that are not
21 evidence, that are not evidential, that are tools that are
22 used for the Court to help identify what the nature of the
23 claim is and how to resolve the evidence issue. Ninety
24 percent of the entries being sought are irrelevant to any
25 decision the Court would ever render on the general

1 challenges motion. That's because during the briefing
2 process, the parties have streamlined the dispute so that
3 almost 90 percent of the entries that the media is seeking
4 will never be relevant, will never be used by the Court to
5 decide the motion.

6 Hurley Exhibit B, which was the privilege log
7 entry exhibit filed with the opening briefs contains over
8 12,500 entries. Preis Exhibit B, which was filed on reply,
9 cut that number to 1,661 entries. So that eliminated
10 approximately 90 percent of the initial privilege log
11 entries from potentially even being relevant to Your Honor's
12 decision and we've cut that number down. By making another
13 production it's still a number in excess of 1,500, and this
14 process is continuing. That was the reason why the UCC
15 sought to defer the motion for which these are relevant.

16 And we suggest, Your Honor, that 107 under the
17 Second Circuit's opinion in Orion codifies the common law
18 right of access and it specifically says the right is not
19 absolute. The Court has to grant the motion to protect if
20 it's under 107(b) in there particular categories, but it has
21 discretion. And the Supreme Court says that when a statute
22 covers an issue that's previously governed by the common
23 law, the statutes interpreted consistently with the common
24 law with the presumption that congress intended to read --
25 retain the substance of the common law.

1 So if we look at what the law is in this area, the
2 leading decision is the decision by the Second Circuit in
3 Brown. And the Court said that the weight to be given a
4 presumption of access for discovery materials depends on the
5 role the material plays in the exercise of judicial power
6 and the resulting value of the information to people, the
7 media and the public monitoring the federal courts.

8 And the reason it says that is it distinguishes
9 summary judgment materials. It says those are automatically
10 reviewable. That's going to lead to an adjudication on the
11 merits. That's an act of government that has to be
12 reviewable. But a discovery issue is not an adjudication on
13 the merits.

14 And here we know that if this motion is decided,
15 it's not going to be used -- Your Honor will not be using at
16 least 90 percent of the materials which the media is
17 seeking. Brown says that you look at the role the material
18 plays in the exercise of judicial power. Well, we know even
19 for the ten percent that remains it's not comparable to
20 summary judgment evidence. It's not any evidence. It's not
21 something you would decide in adjudicating a substantive
22 motion.

23 Public access isn't going to facilitate any
24 meaningful public monitoring of the Court's function and its
25 exercise of its function. All the relevant entries are

1 quoted in the briefs. And there is prejudice in unsealing
2 these materials. They do contain the names of investment
3 counterparties which Your Honor ruled on May 1 would cause
4 harm to the estate because it would cause harm to the
5 Sacklers in connection with their ability to fund any
6 settlement. They contain personally identifying
7 information. All of that would need to be redacted.

8 But there's another prejudice here, too. It's no
9 secret that our clients have been vilified in the media.
10 They're harassed and threatened on social media. So
11 publishing thousands of irrelevant entries listing
12 communications with others over a 25-year period will permit
13 those others to be harassed and threatened, and there is no
14 legitimate need for public access to non-evidence.

15 It's also -- if you think, Your Honor, about this
16 for a moment. Suppose they had made this motion initially
17 when the Hurley Exhibit B was the standard. Then there
18 would have been 12,500 entries that were potentially
19 relevant. Now there are about 1,500. The parties are
20 speaking to see whether they can resolve this general
21 challenges motion altogether and render them entirely
22 irrelevant. If that happens, then this whole issue as to
23 which these non-evidential privilege log entries were filed
24 would be moot.

25 I would suggest, Your Honor, that at a minimum

1 this motion is premature because if the parties succeed in
2 resolving the general challenges motion, then none of these
3 materials are ever going to be relevant to a judicial
4 decision. The issue is going to be moot. Under the common
5 law, Judge Preska (ph) and Magistrate Judge Ellis have ruled
6 documents submitted on a motion that is moot are not
7 judicial documents under the common law.

8 So we would ask the Court if it's not inclined to
9 deny this motion, to adjourn it to the date which is set for
10 the general challenges motion if that's not resolved. And
11 we would also know at that point which, if any, entries
12 might actually be considered by the Court and be relevant to
13 the Court in rendering a decision.

14 Thank you, Your Honor.

15 THE COURT: The issue as to the counterparties,
16 are those current counterparties or past counterparties?

17 MR. JOSEPH: We are concerned about current
18 counterparties. That is what Your Honor permitted us to
19 redact. But we'll have to --

20 THE COURT: Would --

21 MR. JOSEPH: -- go through, you know, thousands --

22 THE COURT: -- that be -- but as far as the
23 privilege logs are concerned, is that -- I mean, are there
24 current counterparties on the privilege logs who are engaged
25 in business not as advisors, but in business with your

1 clients?

2 MR. JOSEPH: Your Honor, because there were 20,000
3 entries on those logs, I can't answer that. I can tell you
4 we -- on the initial set of logs. We will have to go
5 through and identify. But we have provided who's who of
6 people on logs which include counter -- investment
7 counterparties. But we would have to see whether they're
8 within either the 12,500 or the 1,661 or whatever the
9 ultimate number of relevant entries is, depending on Your
10 Honor's decision.

11 THE COURT: But that hasn't been done yet I
12 gather?

13 MR. JOSEPH: We did -- correct. We did not make
14 that review because we don't have Your Honor's permission to
15 do it. This is now an application to unseal and we would
16 have to get permission to be able to continue to do that
17 just like the personally identifying information, which was
18 also ordered on May 1.

19 THE COURT: All right. Have you given me the
20 cases on mootness?

21 MR. JOSEPH: No, Your Honor, we have not.

22 THE COURT: Okay. So what are those cites?

23 MR. JOSEPH: Yes. International Equity Investment
24 Inc. versus Opportunity Equity Partners, 2010 Westlaw
25 779314. That's Magistrate Judge Elli's opinion holding that

1 the motion became moot when the parties entered a
2 stipulation that resolved the issue raised by the motion.
3 Thus the Court didn't use the documents to make a
4 substantive determination because of the targeted doc --
5 because targeted documents don't fall within the category of
6 judicial documents. There's no presumptive right of access.

7 The second case is Giuffre, G-I-U-F-F-R-E, versus
8 Maxwell, 2020 Westlaw 133570, and that's Judge Preska's
9 decision from January 30th of 2020 in which she holds that
10 all disputes regarding the underlying merits of the action
11 have been rendered moot by the settlement. There's, thus,
12 no live controversy to which a judicial power can extend.
13 There was never and now never can be a judicial decision-
14 making process that would trigger the public's right to
15 access the undecided motions and the documents relevant to
16 them.

17 And the Court, Judge Preska, does say in a
18 footnote that the Court will have to consider the issue of a
19 motion that's been submitted and hasn't been decided. But
20 this is a discovery motion. This is not a summary judgment
21 motion which as a matter of law means that every document
22 filed is entitled public access. Loughash (ph) says that and
23 Brown says that. This is a discovery motion and we're
24 dealing with devices or tools, not evidence.

25 Thank you.

1 THE COURT: Okay.

2 MS. TOWNSEND: Your Honor, this is Katie Townsend
3 for the media intervenors. May I respond briefly to the
4 argument that has been made by Mr. Joseph?

5 THE COURT: Sure.

6 MS. TOWNSEND: Thank you. And I would be happy,
7 Your Honor, as well, to the extent that Your Honor wants to
8 take this under submission, we could certainly provide
9 additional briefing to the Court on these issues. I note
10 that the two cases that have been cited by Mr. Joseph,
11 neither of those are bankruptcy cases. And I -- we would
12 agree as the Second Circuit concluded in Orion that Section
13 107(a)'s disclosure requirement is not absolute; that it is
14 qualified, but it is qualified expressly, solely by the
15 exceptions that are set forth in Section 107. And, again,
16 Section 107(a)'s language that indicates that it applies to
17 any paper filed I think would be controlling in this case.

18 I would also note that the Giuffre Maxwell case,
19 Judge Preska's decision, cited -- that was cited by Mr.
20 Joseph is, in fact, is the same case on remand in the Brown
21 v Maxwell case that was cited by the Sackler family parties
22 in their briefing and again indicates to the contrary that
23 material that is cited, that is filed in connection with a
24 discovery motion, it's not as though the common law
25 presumption does not apply to those materials. I think the

1 Second Circuit in Brown v Maxwell make clear that even if
2 the presumption is weaker, it certainly still applies. And,
3 again, I would note that we think that the presumption has
4 been displaced in this context by Section 107 of the
5 Bankruptcy Code.

6 I would also just want -- like to take issue, I
7 think, with the notion that there's a sort of temporal, you
8 know, sort of a time period when material could be
9 accessible to the public and that that can change depending
10 on actions taken by the parties. So taken to its logical
11 conclusion, I think the arguments that Mr. Joseph is making
12 is that if a party were to file a motion for summary
13 judgment under seal, that the public would have a right of
14 access to that if it moved to unseal.

15 But if the parties then reached a settlement
16 agreement and withdrew those motions for summary judgments,
17 that the right of access would sort of evaporate into thin
18 air. And I think that that's just contrary to existing law
19 that makes very clear that the right of access both under
20 the common law and the First Amendment where it applies is a
21 contemporaneous right of access. The Supreme Court in
22 Nebraska Press against Stewart, the cite for that is 423 US
23 13 -- 1327. It's a 1975 decision that makes clear that sort
24 of each day that access is delayed or denied to the public
25 constitutes a separate and cognizable infringement on the

1 First Amendment right of access.

2 And other lower courts agree, the Fourth Circuit
3 in Doe against Public Citizens, the cite for that is 749
4 F.3rd 246. That's a 2014 decision from the Fourth Circuit
5 make clear that when the public and press have a right of
6 access to court documents, that right is contemporaneous.
7 In other words, the right of access attaches.

8 And Section 107(a), again, I think it displaces
9 the common law right, but it certainly applies on its face
10 to any paper filed. It applies as soon as that material is
11 filed with the Court. There's no sort of temporal
12 requirement that the Court rule on a motion or dispose of a
13 motion, and that includes a motion for summary judgment. It
14 includes any kind of motion filed with the Court in order
15 for the public's right of -- to have a right of access to
16 that material.

17 So I think fundamentally that argument is simply
18 mis-- the way that the public's right of access operates.
19 It is intended to allow members of the press and public to
20 observe the progress of proceedings. And that certainly can
21 mean that motions for summary judgment are filed. The
22 public sees those motions for summary judgments, and then a
23 settlement is reached. It can mean that a motion to compel
24 is filed and that the party ultimately withdraws that or
25 narrows the scope of issues -- of the issues to be presented

1 by that motion to compel. That happens routinely. It
2 doesn't alter the public's right of access to that material.

3 And I think finally, Your Honor, I would note that
4 again with respect to the business and investment
5 counterparty information, there simply is no exception under
6 Section 107 that would apply to that type information. If
7 you look at the May 1st, 2020 hearing that Mr. Joseph
8 referenced, he argued at that hearing that the basis for --
9 and, again, we weren't talking about, we weren't talking
10 about sealing material filed with the Court at that point.
11 We were talking about how material exchanged between the
12 parties, the discovery process would be handled by those
13 parties.

14 He contended that to -- that for certain
15 counterparties to be publicly associated with the Sackler
16 family would cause them to, you know, pull away or terminate
17 relationships or potentially end relationships with the
18 family because of that association. That is not a trade
19 secret information. That is not research and development
20 information. That is not confidential commercial
21 information that its disclose would harm an entity's
22 business by giving an unfair advantage to its competitors.
23 It's just simply not the type of information that the
24 exceptions to 107 were intended or the purpose of Section
25 107 -- the exceptions to 107 were intended to protect.

1 And so I think I would just finally say, Your
2 Honor, that with respect to PII, and I think the parties
3 would -- and the redaction of PII and the privilege log
4 materials, you know, I think the parties would agree with me
5 that the media intervenors have not objected to that in a
6 number of the vast majority of the documents that have been
7 filed. Therefore, to the extent the Court would like to
8 proceed to the debtor's request for a reasonable period of
9 time for the parties to review those materials to redact
10 PII's, which is non-public email addresses, things of that
11 nature, the media intervenors would not object to that as a
12 way of moving forward with respect to these materials.

13 And with that, Your Honor, again, we're happy if
14 you would prefer -- if you would like or need additional
15 briefing on any of the legal issues, we're happy to provide
16 that.

17 THE COURT: Okay. Let me go back to Mr. Joseph.

18 I obviously reviewed the Orion Pictures case
19 before this hearing. I've looked at it again. I don't see
20 a recognition by the Circuit in that case that there are any
21 exceptions in 107(a) other than those in 107(b). Am I
22 missing something?

23 MR. JOSEPH: Well, Your Honor, on page 27 -- I'm
24 just going to read two sentences if I may.

25 THE COURT: Right.

1 MR. JOSEPH: Although the right of public access
2 to court records is firmly entrenched and well supported by
3 policy and practical considerations, a right is not
4 absolute. There's a cite to Colliers. And then it says, in
5 limited circumstances the Court must deny access to judicial
6 documents generally where open inspection may be used as a
7 vehicle for improper purposes. Generally, not exclusively.
8 That's not limited to the exceptions in 107(b).

9 Here, the entire purpose on May 1 of not
10 permitting investment counterparty information to go even to
11 the parties int his case was to avoid a leak to the press.
12 That doesn't change because the press now comes to seek it
13 directly. Counsel --

14 THE COURT: But --

15 MR. JOSEPH: -- Ms. Townsend --

16 THE COURT: But on the other hand --

17 MR. JOSEPH: I'm sorry, Your Honor.

18 THE COURT: But congress in 107(a) says, except as
19 provided in Subsections (b) and (c) a paper filed in a case
20 under this title in the dockets of a Bankruptcy Court are
21 public records and open to examination.

22 MR. JOSEPH: Your Honor, I think that there is a
23 fair argument that a privilege log that is sent as a tool to
24 permit the Court to identify documents isn't a paper that's
25 contemplated by that. But I'm not going to say that. I can

1 rely on Orion which gives the Court discretion. There is no

2 --

3 THE COURT: Well --

4 MR. JOSEPH: -- proper purpose in getting --

5 THE COURT: -- the Court only considered 107(b).

6 It didn't consider any other basis for sealing the

7 documents.

8 MR. JOSEPH: That's true. But that is two
9 paragraphs down when it actually goes to the statutory
10 exception. That's subsequent to its recognition of a
11 discretionary exception. And that --

12 THE COURT: Well --

13 MR. JOSEPH: -- is where the inspection may be
14 used as a vehicle for improper --

15 THE COURT: -- do you have any case that provides
16 a discretionary exception that's not within the ambit of
17 107(b) in a bankruptcy case?

18 MR. JOSEPH: Other than Orion I do not, Your
19 Honor.

20 THE COURT: Okay. And I read that language in
21 Orion as just sort of an introductory discussion of the
22 topic of sealing and not a construction of 107(a). I mean,
23 it -- I don't see how a judge-made rule, which is what I
24 think we're talking about in the Brown case and other cases,
25 can override a statute.

1 MR. JOSEPH: Your Honor, the Orion case cites the
2 Nixon decision citing a Rhode Island case saying in this
3 hypo -- in this example, a court can ensure its records are
4 not used to promote public scandal. I mean, it does --

5 THE COURT: Well, but that -- if that's --

6 MR. JOSEPH: -- use its discretion in --

7 THE COURT: I mean, that's a separate provision in
8 107(b). It protects a person with respect to scandals or
9 defamatory matter.

10 MR. JOSEPH: I do understand that, Your Honor. I
11 do understand that. But --

12 THE COURT: I mean, I -- look, I see the language
13 you're referring to. Court's do sometimes like to explain
14 why there are exceptions to something that's a very
15 important public policy, i.e. the First Amendment or common
16 law right to access. And the heading of that section is
17 common law right to access, but it's -- I guess I view that
18 as just an introduction to what the Court actually had to
19 decide which is what exception is there to 107(a). And it
20 only applied 107(b). It didn't look at anything else.

21 MR. JOSEPH: In that case, Your Honor, I cannot
22 disagree. But I think it's relevant that the discussion of
23 107(b) comes up in connection with the common law right of
24 access because the Supreme Court tells us that when a
25 statute covers an issue that was governed by the common law,

1 it should be interpreted consistently. There have to be
2 some limits, which is why the Court talks about improper
3 purposes.

4 And common law --

5 THE COURT: Well, I guess -- although, I mean, the
6 statute I think arguably isn't a major change from common
7 law because (b) largely covers common law provisions.

8 MR. JOSEPH: But common law does go --

9 THE COURT: The common law concept. In one way it
10 makes it broader with the absolute protection for trade
11 secrets or confidential research development or commercial
12 information. And then it has the protection against
13 scandalous and defamatory matter.

14 What it doesn't include, what -- and what is
15 included in Rule 12(f) is irrelevant matter. But I think
16 that's a -- you know, that -- that's a motion to strike
17 something in a pleading, not a --

18 MR. JOSEPH: Well --

19 THE COURT: -- an access to pleadings in the first
20 place.

21 MR. JOSEPH: -- the Court has -- I mean, the Court
22 has access -- the Second Circuit has applied 12(f) beyond --
23 in this -- beyond just filings of pleadings in the case.

24 But, Your Honor, on that reading, which is Ms.
25 Townsend's reading that 107 applies to any paper filed, then

1 in a case like this it could be used as a vehicle to put in
2 anything for ulterior reasons that -- and then ask the press
3 to come and get it.

4 THE COURT: No, but if there are --

5 MR. JOSEPH: I mean --

6 THE COURT: But, again, if there ulterior reasons,
7 then (b)(2) would protect the person.

8 MR. JOSEPH: Well, but I'm talking about non-
9 scandalous and defamatory. I mean, it could be all sorts of
10 things that disclose information just to harm, which is what
11 investment counterparty information does.

12 THE COURT: Well --

13 MR. JOSEPH: Disclosing information --

14 THE COURT: -- but we don't -- I guess that's a
15 separate point that I wanted to raise.

16 One of the key points from the Brown decision,
17 Giuffre v Brown or Brown v Giuffre, and then Brown v Maxwell
18 is that the Court needs to engage in a particularized
19 analysis. I don't know what the level of harm here is. You
20 know, it's -- it -- that analysis hasn't been done by the
21 party that's looking to have these remain sealed. I don't
22 know if there's a threat to safety, for example. You know,
23 I would think that the most persuasive set of facts for your
24 argument, that there's got to be something beyond 107(b) to
25 prevent public access to something filed in a bankruptcy

1 case, or (c) which deals with personally identifiable
2 information, would go to the safety of a person.

3 And yet I don't know whether there's any -- I
4 don't know whether any particular one of these has that
5 issue. It's not been -- in other words, there's a blanket
6 sealing here. So it would seem to me that pending that
7 review, the privilege logs should be disclosed with the
8 exception of what's covered by 107(c) personal identifiers,
9 and however without prejudice to the making of a motion,
10 which I would decide on an actual factual record as to
11 whether there is some level of information that is protected
12 here either under 107(b)(1) or (2) or under some common law
13 theory.

14 But I'm just -- we're just hypothesizing right
15 now. We really don't know what we're talking about.

16 MR. JOSEPH: But, Your Honor, if I may --

17 THE COURT: So it seems to me that the burden on
18 this point should be -- since you're going to be reviewing
19 the documents anyway, would be to raise it in that context
20 as opposed to in a general context.

21 MR. JOSEPH: Your Honor, counsel for the press has
22 suggested briefing. I've been provided by one of my
23 colleagues with a Bankruptcy Court case from the District of
24 Delaware that does contemplate that a Court retains
25 authority to seal documents when justice so requires.

1 Owings Corner Armstrong 560 --

2 THE COURT: Well, that -- that's fine. But I
3 guess my issue is I would like to know when justice so
4 requires beyond just the proposition, which is not on the
5 record before me at this point.

6 MS. MONAGHAN: Your Honor, this is Maura Monaghan
7 from Debevoise & Plimpton. I represent the Mortimer Sackler
8 branch of the Sackler family.

9 THE COURT: Right.

10 MS. MONAGHAN: I just wanted to raise one
11 complication to perhaps discuss about process for making
12 that showing.

13 Your Honor raised the concern about safety which
14 is a real concern and does, we think, require redaction of
15 certain names. The trouble is if we file something making
16 that motion on the docket, that itself becomes a filing and
17 we have concerns about copycats. I don't know if Your Honor
18 has any suggestion for a procedure to address that concern.
19 But one of the cleft sticks (sic) we find ourselves in is we
20 don't necessarily want to publicize the threats against our
21 clients and, you know, where those threats took place or
22 what types of threats they were.

23 THE COURT: Well, has this been discussed with the
24 media parties at all?

25 MS. MONAGHAN: I don't believe it's been up for

1 discussion until now. We could have that conversation --

2 THE COURT: All right.

3 MS. MONAGHAN: -- with Ms. Townsend.

4 THE COURT: Look, I want to step back for a
5 second.

6 As everyone on this -- every lawyer on this call
7 knows, I really like the briefing to be in advance because I
8 rule from the bench and because these matters need to move
9 ahead and don't warrant delay with a written opinion.

10 Normally I would be quite cross with parties that
11 haven't cited me any of the applicable case law, in fact,
12 any of the actual reasons for denial of the motion except
13 for the reason that was asserted based on the information
14 being irrelevant, which is actually something that I was
15 able to research and it was actually well dealt with in the
16 context of 12(h) -- I'm sorry -- 12(h) -- 12(f) of the
17 federal rules by another District Court, a later District
18 Court.

19 So on the other hand, this motion as it was
20 originally styled and pursued covered an enormously greater
21 amount and range of documents, and the parties have been
22 working hard on narrowing those down and saving the Court
23 from a lot of work on a lot of other issues.

24 I still don't have copies of the other two
25 documents that I actually need to focus on to see if

1 107(b)(1) applies. So I guess all things considered rather
2 than simply saying, no, I'm not going to take any more, you
3 had your chance and that's it. It probably makes sense for
4 the parties to discuss these two documents as well as give
5 me those documents and I guess provide me at least with the
6 case law on this in simultaneous briefs.

7 I have to say that generally speaking it's hard to
8 see how privilege logs really would lead to anything
9 material in a newspaper story. But that's not ultimately
10 the point except to say that it's probably worth adjourning
11 this so that I can get those briefs and decide it at the
12 next omnibus hearing with the actual pleadings -- I'm sorry
13 -- the actual court filings that are sought to be redacted
14 and a further description of what the concern is in real
15 terms that the Sacklers have with regard to the privilege
16 logs.

17 In that context, I would expect the media
18 representatives to act responsibly about some means to
19 protect people from public disclosures, to threats on their
20 life or their safety. That's not something that any
21 reputable media outlet and certainly the media companies
22 that are part of Ms. Townsend's client group are responsible
23 media companies.

24 So I am assuming you would -- you people would be
25 able to work something out on that point so that I could

1 have a proper record before me.

2 MS. TOWNSEND: Your Honor, this is Katie Townsend
3 on behalf of the media intervenors. Just to be clear, this
4 is the first throughout this entire process that we have
5 heard anyone raise any concern with respect to any of the
6 documents that were at issue here, about any --

7 THE COURT: Well, I understand, Ms. Townsend.
8 And --

9 MS. TOWNSEND: Okay.

10 THE COURT: -- frankly, I came into this hearing
11 about 99 percent sure that I would grant your motion as to
12 the privilege logs except for personally identifying
13 information covered by 107(c).

14 But it could be met by the Sacklers' own motion to
15 seal under 107(c) even if I directed these to be unsealed
16 upon a proper review by them, which is really all that I'm
17 asking to have happen at this point. And so, you know, I
18 think that's just where we are.

19 And I have it hard to belief, put it differently,
20 I find it hard to believe that any press account related to
21 this case generally would be unduly delayed because
22 privilege logs weren't provided, given everything else
23 that's been provided as far as claims and defenses asserted
24 by the parties that go right to the merits.

25 MS. TOWNSEND: Your Honor, I don't think --

1 MR. LEES: Your Honor, this is --

2 MS. TOWNSEND: Oh, I apologize. Go ahead.

3 MR. LEES: Your Honor, this is Alex Lees at
4 Milbank for the Raymond Sackler family. I'm co-counsel to
5 Mr. Joseph. I just wanted to make one observation of the
6 facts so that the record is clear, which is that our
7 position with respect to the right to redact counterparty
8 names in the public versions of documents that was filed was
9 made in our statement in response to the original motion to
10 unseal filed by the press intervenors.

11 THE COURT: Yeah. No, I know --

12 MR. LEES: And --

13 THE COURT: -- it was. But it wasn't
14 particularized. I didn't know who those people were, you
15 know, what it was, you know. I mean, it -- whether they're
16 current, whether they're past. It's just sort of a general
17 statement. So it's fine as far as it goes, but it's just --
18 you know, if -- as far as meeting a burden, it's just not
19 there.

20 MR. LEES: Understood, Your Honor. We had
21 intended to rely on the previous colloquy and ruling in the
22 court. But I understand the point and we will address it in
23 a more particularized way given the opportunity for further
24 briefing.

25 Thank you.

1 THE COURT: Okay. All right.

2 Now, Ms. Townsend, you were going to say
3 something, too.

4 MS. TOWNSEND: Your Honor, I was just going to say
5 that I understand the predicament that you're in. I mean, I
6 think we came into this -- the media intervenors came into
7 this hearing very much of the view that the parties had not
8 met their burden to demonstrate that this material to remain
9 sealed precisely because they have not made a particularized
10 showing.

11 THE COURT: Right.

12 MS. TOWNSEND: I think that to the Court -- we do
13 not object to the Court giving the parties a reasonable
14 opportunity to -- to giving the parties, including the media
15 intervenors an opportunity to submit additional simultaneous
16 briefing, and provided that the party -- to the extent that
17 the parties are arguing that portions of these documents
18 should remain sealed, that they do, in fact, make that
19 particularized showing for the Court.

20 I recognize we could talk a little bit more about
21 process. I am happy to defer to whatever Your Honor thinks
22 is the right process, but I want it to be clear that to the
23 extent the Court needs additional information and believes
24 additional information be submitted for Your Honor to rule,
25 we don't object to that approach.

1 THE COURT: Okay.

2 MR. HURLEY: Your Honor, it's Mitch Hurley.

3 THE COURT: Okay. I did just get -- I did just an
4 email from the debtor's counsel that, I guess, has these
5 documents attached.

6 MR. KAMINETZKY: Your Honor, we tried initially to
7 just send it by email and it got bounced several times by
8 the Court because of its size. So we had to set up this
9 client link or whatever it's called. So now Your Honor
10 should have it in a form.

11 But I don't -- I don't know if Your Honor wants to
12 deal with this today because what we sent Your Honor is --

13 THE COURT: No. I will review it. I may just
14 give the parties my ruling separately on this one. I mean,
15 again, my chambers practice on motions to seal is to insist
16 that I get the unredacted document and the redacted
17 document. I look at them and I decide whether I think it's
18 covered by 107 or not, 107(b) or not.

19 And I have the briefing on this. I have your
20 arguments. I think I have the case law on it. We're just
21 talking about 107(b) as far as Exhibits 137 and 123 are
22 concerned. So I don't need any more briefing on that. And
23 I may just rule on that before the next hearing.

24 MR. KAMINETZKY: That's fine, Your Honor. Let me
25 just -- if you could just allow me to explain. What we sent

1 Your Honor was what we called transparent redactions in that
2 you have the whole document, but we put --

3 THE COURT: Yeah.

4 MR. KAMINETZKY: -- red boxes around --

5 THE COURT: The redline.

6 MR. KAMINETZKY: Right.

7 THE COURT: The redline. I see that.

8 MR. KAMINETZKY: So that you know what it is that
9 -- and we think that this falls -- everything Your Honor
10 said. This is just a 107(b) and --

11 THE COURT: Right.

12 MR. KAMINETZKY: -- we think Mr. Lowne in the
13 declaration that we submitted in connection with our papers,
14 this one declaration that he explains what the basis is
15 under 107(b) for the proposed few redactions on those two
16 documents. And as far as the debtor is concerned, we'll --
17 with respect to the privilege log we'll do what we said we
18 would do. We would just -- we would redact PII and, you
19 know, any personal identifying information like email
20 addresses, and then just take a quick look to make sure
21 there's nothing -- no 107(b) information in the subject
22 line, and then just give us a week or two and we'll unseal
23 that.

24 THE COURT: Okay. Well, as far as that's
25 concerned, I think that -- I don't think you're going to

1 have to have armies of people on it. I can't imagine a
2 privilege log likely to have sensitive commercial
3 information on it. But I understand you want to eyeball it
4 for sure.

5 Okay. So I will adjourn the hearing on this
6 motion on --

7 MR. HURLEY: Judge, may I --

8 THE COURT: There was just an update motion. So
9 it's really one motion, although there are two motions on
10 the calendar from the media parties to the next omnibus
11 hearing.

12 It's unlikely that I will take additional oral
13 argument. The parties are both represented by -- are all
14 represented by capable counsel. And I will -- I know Ms.
15 Townsend said supplemental briefing. I think actually it's
16 incumbent upon the Sackler parties to submit their brief
17 first and after consulting with the media parties about the
18 safety issue, if that's still an issue and hopefully
19 resolving that, also including for me, you know, specific
20 documents, clean and redacted, that are at issue. I have a
21 feeling that most of the entries won't be. And so I want to
22 have the ones identified that are at issue specifically.

23 And then a reply brief can be filed by the media
24 parties three days before the hearing.

25 DR. JOSHI: Your Honor --

1 MR. HURLEY: Your Honor, does that --

2 DR. JOSHI: Your Honor, I was granted by the Court
3 in December a moment to speak about --

4 THE COURT: No. No. I want to continue on this
5 matter. Does anyone have any more matters on the media
6 motions?

7 MR. HURLEY: Your Honor, it's Mitch Hurley. Can I
8 just make one point of clarification very briefly?

9 THE COURT: Sure.

10 MR. HURLEY: Okay. Mitch Hurley for the
11 committee. The official committee takes no position on the
12 unsealing of the privilege logs, Your Honor. We don't
13 advocate for it. We don't oppose it.

14 I do want to be clear, though, that the exhibits
15 we're talking about actually are not exclusively related to
16 the log challenges motion. There are entries on those
17 exhibits that we have identified as samples in connection
18 with the exceptions motion as well.

19 I just wanted to make that clear for the record.

20 Thank you.

21 THE COURT: Well, when you say the exceptions
22 motion -- I'm sorry. What two motions are you referring to?

23 MR. HURLEY: Sure. So the committee filed two
24 motions to compel. One is referred to as the log challenges
25 motion, which was a motion made -- based on ordinary

1 challenges to a privilege log. Third parties are present,
2 you know, non-lawyers waiver, that sort of thing.

3 And then there's the other motion which is the
4 exceptions motion based on the crime fraud and at issue
5 exceptions --

6 THE COURT: Right. But they both go to --

7 MR. HURLEY: -- of these --

8 THE COURT: -- they both go to privilege issues.

9 MR. HURLEY: Correct.

10 THE COURT: And that's how I'm -- that's how I'm
11 treating this even though there are two separate motions.
12 They're both dealing with the admissibility or the -- I'm
13 sorry, the require -- the requirement to produce --

14 MR. HURLEY: Correct.

15 THE COURT: -- what are asserted to be privilege
16 documents.

17 MR. HURLEY: Correct. I'm just responding to Mr.
18 Joseph had suggested that if we're able to resolve the log
19 challenges motion --

20 THE COURT: Well, you would have to -- yeah. I
21 understand, although again --

22 MR. HURLEY: Yeah.

23 THE COURT: -- that assumes that I think that
24 there are limits and that those limits are within the facts
25 beyond what is set forth in 107(b) to 107(a) of the

1 Bankruptcy Code.

2 MR. HURLEY: Understood.

3 THE COURT: So there you are.

4 I guess -- so I didn't set a date for the brief
5 from the Sacklers or briefs from the two sides of the
6 Sackler family. I would say when is -- can someone remind
7 me when the February omnibus hearing is?

8 MR. JOSEPH: I believe it's February 17th, Your
9 Honor.

10 THE COURT: All right. So the 14th would be the
11 reply. I guess the 7th would be the date for the brief.

12 MR. JOSEPH: Thank you, Your Honor.

13 THE COURT: Okay. Or briefs if the two different,
14 Side A and Side B want to file separate briefs.

15 Okay. Now someone was speaking up about some
16 other matter. I think that is the end of today's calendar.
17 But I think someone --

18 DR. JOSHI: Yes.

19 THE COURT: -- was raising his hand to speak.

20 DR. JOSHI: Yeah. Judge Drain, thank you for a
21 time. My name is Dr. Jay Joshi. I filed amicus on behalf
22 of my patients who are represented in some of the cases that
23 have been aggregated.

24 I understand that we're turning towards the end so
25 I will make this quick.

1 First of all, I would like --

2 THE COURT: No. No. Mr. Joshi, no, don't --
3 wait. I'm going to interrupt you, Doctor.

4 I thought that I had explained this to you in an
5 email. I'm going to explain it now again, and I apologize
6 if it wasn't clear before.

7 When one wants to file an amicus pleading, two
8 things have to apply. First, there has to be a motion for
9 leave to file it; and, second, it has to apply; that is, the
10 underlying pleading has to apply to something that is before
11 the Court to decide.

12 If the Court grants permission to file the amicus
13 pleading, it will consider it only in that context, i.e. it
14 is part of the record for the matter that the Court has
15 before it to decide. There is nothing before me on today's
16 calendar that pertains to your amicus pleading. There is no
17 motion to which that pleading would apply.

18 So somehow you've gotten the impression that you
19 can pursue this matter today. That's simply not the case.
20 An amicus pleading is, as the name suggests, a pleading
21 filed by someone who as a friend to the Court wants to
22 elucidate and illuminate further than the parties have the
23 issues before the Court on a particular matter that the
24 Court has to decide. I don't have anything before me
25 relating to the document that you have filed.

1 DR. JOSHI: Okay. I understand, sir. I can
2 probably send you emails that refute that, but out of
3 respect for your time, sir, and respect for everybody else
4 we can maybe take this offline, otherwise I can continue
5 discussion. But I respect for the Court that --

6 THE COURT: No. There's nothing to discuss
7 offline, sir. The calendar today had five matters on it,
8 some of which had subparts. None of them pertained to the
9 document that you have filed. Sometime in the future there
10 may be an issue before me to decide that does pertain to it,
11 at which point you should file a motion seeking leave for
12 consideration of an amicus brief. But there's nothing
13 before me today.

14 And I don't want there to be any more confusion on
15 it. There's no more reason to talk to anyone in chambers
16 about it, to anyone in the clerk's office or to me about it.
17 I just want to be clear on that. Okay.

18 Again, courts decide specific things that are
19 brought before them on a proper record with proper briefing
20 and proper notice. They're not general forums for
21 expressions of opinion. Those are, you know, the Boston
22 Globe or Dow Jones or Reuters or a law review article. But
23 that's not the Court's function.

24 So I think that does close the agenda for
25 today's hearings. And I'll see you all at the omnibus date

1 or, actually, probably just hear you all at the omnibus date
2 in February.

3 Okay. Anything else from anyone?

4 All right. Very well. Thank you, all.

5 MR. JOSEPH: Thank you, Your Honor.

6 MR. KAMINETZKY: Thank you.

7 (Whereupon these proceedings were concluded at

8 1:20 PM)

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C E R T I F I C A T I O N

We, William J. Garling, Pamela A. Skaw, and Sherri L.

Breach, certify that the foregoing transcript is a true and
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